IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.

CENTRAL STATES COOPERATIVES, INC.,
Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

Index to proceedings in the United States District Court i

Clerk's Certificate to printed record..... 177

Index to proceedings in the United States Circuit Court of Appeals for the Seventh Circuit:

Placita 179

Appearance for appellant, filed Feb. 1, 1947..... 179

Appearance for appellee, filed Feb. 6, 1947..... 180

Reference to filing of Briefs of Counsel:

Appellant's Brief, filed June 9, 1947..... 180

Appellee's Brief, filed June 30, 1947..... 180

Reply Brief, filed July 11, 1947..... 180

Notice and Motion of Appellant to Reverse and and Remand to District Court, filed Sept. 23, 1947 181

Exhibit A, Certified copy of Instrument, dated July 14, 1947..... 186

Exhibit B, Certified copy of Complaint, filed in District Court in Case No. 47-C-1145..... 190

Reference to filing of Appellee's Brief in opposition to appellant's motion on Oct. 15, 1947..... 193

Order denying appellant's motion to reverse and remand, entered Oct. 30, 1947..... 194

Reference to filing of Appellant's Brief in support of motion to reverse and remand on Nov. 10, 1947 194

Reference to filing of appellee's supplemental brief in opposition to brief of appellant in support of motion to reverse and remand on Nov. 27, 1947 194

Opinion by Major, C. J., filed Dec. 12, 1947..... 195
Dissenting opinion by Evans, C. J. 203
Judgment Reversing and Remanding to the District Court, entered Dec. 12, 1947..... 216
Reference to filing of petition for rehearing on Dec. 27, 1947 216
Reference to filing of answer to petition for rehearing on Jan. 7, 1948..... 216
Reference to filing of petition to certify propositions of law to the Supreme Court on Jan. 8, 1948 217
Reference to filing of brief in support of petition to certify propositions of law to Supreme Court on Jan. 10, 1948..... 217
Reference to filing of answer and objection of petition to certify propositions of law to the Supreme Court on Jan. 13, 1948..... 217
Reference to filing of brief in opposition to petition to certify propositions of law to Supreme Court on Jan. 13, 1948 217
Order denying petition for rehearing, entered Jan. 20, 1948 218
Notice and petition for stay of mandate filed Jan. 21, 1948 219
Order staying mandate pursuant to Rule 25, entered Jan. 21, 1948 221
Order denying petition for certification of questions to Supreme Court, entered Jan. 22, 1948.. 222
Notice and Designation of record, filed Jan. 30, 1948 223
Clerk's Certificate 226

In the

United States Circuit Court of Appeals
For the Seventh Circuit

No. 9291

CENTRAL STATES COOPERATIVES, INC.,
Plaintiff-Appellee,

vs.

WATSON BROS. TRANPORTATION COMPANY, INC.
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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INDEX.

Placita 1
Transcript from Municipal Court 3
Praecipe 3
Statement of Claim 4
Summons 5
Petition for Removal 7
Indenture, dated July 31, 1945 10
Affidavit of William M. Wolfe 19
Affidavit of Mark Levy 21
Removal Bond 23
Removal Order 25
Security for Costs, filed Nov. 14, 1946 27
Answer, filed Nov. 19, 1946 28
Exhibit A—Indenture, dated July 31, 1945 30
Notice of Motion, filed Nov. 25, 1946 39
Order re: Amended Complaint, entered Nov. 25, 1946. 40
Amended Complaint, filed Nov. 25, 1946 40
Jury demand, filed Nov. 25, 1946 48
Motion to strike Amended Complaint, filed Dec. 5, 1946 48
Notice of motion to overrule motion to strike, etc., filed Dec. 9, 1946 51
Motion for continuance, filed Dec. 10, 1946 52
Affidavit of Theodore R. Sherwin 53
Affidavit of Stanley Garrity, filed Dec. 10, 1946 55
Order overruling motion to strike, etc., entered Dec. 10, 1946 56
Notice of Motion, etc., filed Dec. 17, 1946 57
Motion to produce, filed Dec. 17, 1946 58
Affidavit of Thomas G. McBride 58
Order to produce, entered Dec. 17, 1946 60
Answer to Amended Complaint, filed Dec. 17, 1946 61
Proceedings of Dec. 18, 1946 64
Order continuing cause, entered Dec. 18, 1946 81

TRANSCRIPT OF PROCEEDINGS.

Colloquy 82, 106, 114

WITNESSES FOR DEFENDANT.

Testimony of:
Lehtin, Laurie L. 113
Wolfe, William M. 85

DEFENDANT'S EXHIBITS.

No. 1—Indenture, dated July 31, 1945 122
No. 2—Letter May 28, 1946, Witwer, Jr. to Watson 130
No. 3—Letter June 7, 1946, McBride to Watson Bros... 132
No. 4—Letter Oct. 2, 1946, Lehtin to Watson Bros..... 133
No. 4-A—Envelope containing Exhibit No. 4 133
No. 5—Photographs of building 135
No. 6—Floor plan of building 136
No. 7—Plat and Survey 137
No. 8—Letter June 25, 1946, McBride to Watson Bros.. 139
No. 9—Letter June 17, 1946, Richter to Wolf 140
Plaintiffs' motion for directed verdict, filed Dec. 23, 1946 141
Instructions to Jury, filed Dec. 23, 1946 142
Verdict, Dec. 23, 1946 142
Judgment, entered Dec. 23, 1946 143
Notice of Appeal, filed Dec. 24, 1946 145
Statement of Points 147
Order approving Supersedeas Bond 149
Supersedeas Bond 150
Proceedings of Jan. 8th and 10th, 1947 158
Order to submit proposed Findings of Fact, etc..... 161
Notice of proposed Findings of Fact, etc. 162
Defendant's objections to proposed Findings of Fact, etc. 163

Order re: Exhibits 165
Findings of Fact, filed Jan. 23, 1947 165
Conclusions of Law 169
Order overruling objections, etc. 171
Designation of Record 172
Appellee's Designation of Record 175
Clerk's Certificate 176

1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of November (it being the 4th day thereof) in the year of our Lord One Thousand Nine Hundred Forty-six and of the Independence of the United States of America, the 171st year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Tuesday, December 10, 1946.

Court met pursuant to Adjournment.

Present: Honorable Elwyn R. Shaw, Trial Judge.

2 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the third Monday of December (it being the 16th day thereof) in the year of our Lord One Thousand Nine Hundred Forty-six and of the Independence of the United States of America, the 171st year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, December 23, 1946.

Court met pursuant to Adjournment.

Present: Honorable Elwyn R. Shaw, Trial Judge.

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3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

Central States Cooperatives, Inc. a District of Columbia corporation,
Plaintiff,
vs.
Watson Bros. Transportation Company, Inc., a Nebraska corporation.
Defendant.
No. 46 C 1886

Be It Remembered, that the above entitled action was commenced in this Court on the 14th day of November, 1946, by the filing of a Transcript of Record on Removal from the Municipal Court of Chicago, a portion of which record, viz. the Plaintiff's original Praecipe and Statement of Claim, are in words and figures following, to wit:

4 Forcible Detainer—Praecipe and Statement of Claim.
M. C. C. 12 New.

IN THE MUNICIPAL COURT OF CHICAGO,

First District.

Central States Cooperatives, Inc., a District of Columbia corporation,
Plaintiff,
vs.
Watson Bros. Transportation Company, Inc., a Nebraska corporation,
Defendant.
No. 46M60387.
Forcible Detainer.

Praecipe.

The clerk will issue a summons in the usual form requiring the appearance of the defendant at or before 9:30 a. m. on the 8th day of October, 1946.

Brenner & McBride,
Attorneys for Plaintiff.

Address for Service and Telephone 100 N. LaSalle St., Ran. 4477.

Statement of Claim.

The plaintiff claims as follows:

1. The plaintiff is entitled to the possession of the following described premises in the City of Chicago, legally described as:

That part of the North Half (N½) of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street, as it exists South of vacated West 33rd Street, which is Fifty (50) feet wide, extended Northwesterly with North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to Westerly dockline of South fork of South branch of Chicago River, as occupied; thence North Forty-one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One Hundred Sixty-six (166) feet Eight and One-eighth (8 1/8) inches; thence North Thirty-two (32) degrees, Forty-seven (47) minutes, West, Sixty-three (63) feet Four and One-half (4½) inches; thence North Twenty-nine (29) degrees, Forty-six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and One-half (11½) inches more or less along said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decrett's Subdivision of Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Alice Lynch's Subdivision of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty-eight (288) feet Nine and Five-eighths (9 5/8) inches more or less to intersection of said line with center line of vacated Iron Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of vacated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred Ninety-eight (498) feet and Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet, more or less; and commonly known as 3201 S. Iron Street, Chi-

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cago, Illinois, together with all buildings and improvements thereon.

2. The defendant unlawfully withholds possession thereof from the plaintiff. The plaintiff claims possession of the property.

Brenner & McBride,
Attorneys for Plaintiff.

I, Thomas G. McBride, make oath and say:

1. My age is legal years, my residence 100 N. LaSalle Street, Chicago and my occupation attorney.

2. I am one of the attorneys for the plaintiff in the above entitled action and as such have full knowledge of the facts relating to the above statement of claim.

3. The facts alleged in the above statement of claim are true.

Subscribed and sworn to before me this 2nd day of October, 1946.

Thomas G. McBride,
Colette Diver,
(Seal) *Notary Public.*

6 And on the same day on, to wit, the 14th day of November, 1946 as a portion of said record there was filed in the Clerk's office of said District Court a certain Summons with Bailiff's Return thereon in words and figures following, to wit:
M. C. C. 54-A New.

7 IN THE MUNICIPAL COURT OF CHICAGO,
* * (Caption—46-M-60387) * *

SUMMONS.

The People of the State of Illinois to the Bailiff of The Municipal Court of Chicago:

You are hereby commanded to summon the above named defendant Watson Bros. Transportation Company, Inc., a Nebraska Corporation to either appear in person before said court in the above entitled action at Room No in the City Hall, Chicago, Illinois, on the 8th day of October, 1946, and file his appearance in writing* with the clerk of

said Court, or cause its appearance in writing* by itself or attorney to be entered in said action at or before that time in the office of the clerk of said court in Room 814 in said City Hall, to answer to the Statement of Claim of the above named plaintiff, a copy of which is hereto attached.

Witness, Joseph L. Gill, the clerk of our said Court and the seal thereof, this 2nd day of October, 1946.

Joseph L. Gill,
Clerk.

*Notice To All Parties.

This case will not be tried on the return day fixed herein. You need not appear personally on return day, but a written appearance must be filed in the Clerk's Office, Room 814, City Hall, by or on behalf of every defendant, before the return day call. On the return day call the Chief Justice will continue and assign this case for trial on a specific date to one of the Civil Trial Branches of this Court in the City Hall.

Edward S. Scheffler,
Chief Justice

8 MUNICIPAL COURT.

* * (Caption—46-M-60387) * *

Summons.

Oct. 2, '46 Received 1st District.
Amount Claimed ... $.....
Serve Defendant at 3201 S. Iron St.

Joseph L. Gill,
Clerk of the Municipal Court of Chicago.

I have duly served the within writ upon the within named defendant, Watson Bros. Transportation Company Inc., a Nebraska Corporation, a corporation on the 3rd day of October, 1946 by leaving a copy thereof, together with a copy of the Plaintiff's Praecipe and Statement of Claim with R. Crowley an agent of said defendant found in the City of Chicago.

Albert J. Horan,
Bailiff.
Thomas Genkowski,
Deputy.

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9 And on the same day on, to wit, the 14th day of November, 1946 as a portion of said record there was filed in the Clerk's office of said District Court a certain Petition for Removal in words and figures following, to wit:

10 IN THE MUNICIPAL COURT OF CHICAGO.
* * (Caption—46-M-60387) * *

PETITION FOR REMOVAL.

Your petitioner, Watson Bros. Transportation Co., Inc., a Nebraska corporation, defendant in the above entitled cause, petitions the Court to remove the above entitled cause to the United States District Court for the Northern District of Illinois, Eastern Division, and respectfully shows this Honorable Court:

1. That it is a corporation organized, incorporated and existing under and by virtue of the laws of the State of Nebraska, and is a citizen of that state;

2. That the plaintiff, Central States Cooperatives, Inc., is a corporation duly organized and existing under and by virtue of the laws of the District of Columbia, and is a citizen of the District of Columbia;

3. That this is a controversy between a citizen of the State of Nebraska and a citizen of the District of Columbia, of which controversy the District Court of the United States has jurisdiction, and is a controversy which can be fully determined between them.

4. That suit is for the possession of certain real
11 property which is more fully described in plaintiff's Statement of Claim, and also more fully described in the lease referred to in paragraph numbered five hereof, which real property consists of garages, docks, and offices used by your petitioner in the operation of its business as a common carrier by motor truck.

5. That your petitioner has been in possession of said premises under a certain lease dated July 31, 1945, by and between Charles H. Morse, Jr., and Watson Bros. Transportation Co., Inc., a Nebraska corporation, copy of which lease is attached hereto marked "Exhibit A" and by this reference made a part hereof;

6. That the said lease provides among other things, an option on the part of your petitioner to purchase said property prior to the right of any other party to purchase during the terms of the said lease;

7. That when the plaintiff herein made its offer to the lessor of the defendant to purchase the said property, said offer under the terms of the said lease was communicated to your petitioner; that your petitioner then communicated with the plaintiff and advised the plaintiff that unless it could remain in the premises for the nine month period commencing October 1, 1946 to June 30, 1947 that it would be required to exercise its option to purchase provided for in said lease by reason of the fact that no other premises were available and suitable for the purposes of the petitioner in the operation of its business;

8. That plaintiff through its proper officers and agents entered into an oral agreement with your petitioner in June, 1946 whereby it was agreed that in consideration of the agreement of the petitioner to refrain from
12 exercising its option to purchase, the plaintiff would permit your petitioner to remain in possession of the premises for the nine month period from October 1, 1946 to June 30, 1947 at a monthly rental of Eight Hundred Fifty Dollars ($850.00); that by reason of said agreement, your petitioner did refrain from exercising its right to purchase the premises and has remained in possession of the said premises and the plaintiff did purchase and acquire title to the said premises;

9. That by reason of the aforesaid allegations, this suit for possession is in effect a suit to terminate the lease between the plaintiff and your petitioner, which lease covers the period October 1, 1946 to June 30, 1947; that as more fully appears from the affidavit of William M. Wolfe, Vice-President of your petitioner, copy of which affidavit is hereto attached marked Exhibit "B", and by this reference made a part hereof, that in the event the plaintiff is successful in securing possession and thereby terminating the said lease, your petitioner would suffer a loss from the period October 1, 1946 to June 30, 1947 of approximately $43,200.00; that the loss of profit would be $1,200.00 per week;

10. That as more fully appears from the affidavit of Mark Levy attached hereto marked "Exhibit C" and by

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this reference made a part hereof, the difference between the value of the premises which are the subject matter of this suit, free and clear from the encumbrance of the nine month lease under which your petitioner holds possession is the sum of $105,000.00 and its value subject to the encumbrance of the said nine month lease is the sum of $100,000.00 making the difference between the value free from the encumbrance of the lease and subject to the encumbrance of the said lease the sum of $5,000.00.

13 11. That by reason of the foregoing allegations the amount in controversy in this matter exceeds the sum of $3,000.00 exclusive of interest and costs;

12. That defendant has filed no pleadings in said cause and that the time in which this defendant is required to answer or plead has not expired and that he has a good and sufficient defense to this cause of action;

13. That written notice of the intention of the petition for removal and the removal bond was given on the 14th day of October, 1946 to Brenner and McBride, attorneys of record for the plaintiff in this action and that at the time of giving such notice of petition and removal bond filed herewith, a copy of such petition and the removal bond was handed to said attorneys of record for the plaintiff;

14. That your petitioner desires to remove this action into the District Court of the United States for the Eastern Division of the Northern District of Illinois, in pursuance of the acts of Congress in that behalf made and provided. Your petitioner therefore files and offers herewith a bond with good and sufficient surety in the penal sum of $1,000.00 conditioned as required by law for entry in the said District Court of the United States in the manner and at the time provided for by law of a copy of the record in this matter and to pay all costs that may be awarded in said District Court of the United States aforesaid, if said Court should hold that this action was wrongfully and improperly removed thereto.

Your petitioner, therefore prays that the said bond be accepted as good and sufficient and that this Court will make and enter an order for the removal of this action into the said District Court of the United States to be held in and for the Northern District of Illinois in which District this action is pending and will cause the record

herein to be removed to the said District Court of the United States and that no further or other proceedings may be had with respect to this matter in the Municipal Court of Chicago, pending the final decision of this Controversy in the United States District Court.

Watson Bros. Transportation Co., Inc., A Nebraska Corporation,
Defendant.

By Sherwin & Sherwin,
Attorneys for the Defendant.

State of Illinois, } ss:
County of Cook. }

Theodore R. Sherwin, being first duly sworn, deposes and says that he is a member of the firm of Sherwin & Sherwin, attorneys of record for the defendant in the above entitled cause, and is authorized to execute this affidavit in his behalf; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true.

Theodore R. Sherwin.

Subscribed and sworn to before me this 14th day of October, 1946.

Janet Brainard,
Notary Public.

(Seal)

EXHIBIT A.

This Indenture made this 31st day of July, A. D. 1945, by and between Charles H. Morse, Jr., of the Village of Libertyville, Lake County, Illinois, party of the first part, (hereinafter referred to as "Lessor") and Watson Bros. Transportation Co., Inc., a Nebraska corporation, with office and place of business in the City of Chicago, Illinois, party of the second part (hereinafter referred to as "Lessee"),

Witnesseth:

In consideration of the rents herein reserved and of the covenants and agreements herein contained on the part of the Lessee to be kept, observed and performed, Lessor has demised and leased and does by these presents demise and lease unto the Lessee the following premises:

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That part of the North Half (N½) of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian, in the County of Cook, State of Illinois, more particularly described as follows:

Beginning at a point which is the intersection of the center line of vacated Iron Street as it exists South of vacated West 33rd Street where it is Fifty (50) feet wide, extended Northwesterly, with the North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to the Westerly dock line of the South Fork of the South Branch of the Chicago River, as occupied; thence North Forty-one degrees, thirty minutes, thirty seconds (41° 30′ 30″) West, One Hundred Sixty-six (166) feet, Eight and One-eighth (8⅛) inches; thence North Thirty-two degrees, Forty-seven minutes (32° 47′) West, Sixty-three (63) feet, Four and one-half (4½) inches; thence North Twenty-nine degrees, forty-six minutes, Twenty seconds (29° 46′ 20″) West, One Hundred Twenty (120) feet,
Eleven and one-half (11½) inches, more or less along
16 said dock line as occupied to a line formed by the extension East of the South line of Lot Eight (8) of Shepard & Decreet's Subdivision of Lots Twenty-One (21), Twenty-two (22) and Twenty-three (23), in Alice Lynch's Subdivision in the Northwest quarter (NW¼) of Section thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty-eight (288) feet, Nine and Five-eighths (9⅝) inches, more or less, to the intersection of said line with the center line of vacated Iron Street as it exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along the said center line of vacated Iron Street (as it exists South of vacated West 33rd Street extended Northwesterly), Four Hundred Ninety-eight (498) feet and Nine (9) inches to the place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet more or less; except therefrom a tract of land bounded by a line described as follows:

Beginning at the point of beginning of the tract of land hereinabove described; thence Northeasterly on the Southerly line thereof Forty-nine (49) feet Ten and one-half (10½) inches to the East line of vacated Iron Street North

of vacated West 33rd Street; thence Northwesterly along the said Easterly line of vacated Iron Street Three Hundred (300) feet, Seven-eighths (⅞) inches more or less to the intersection of said East line with the Westerly line of the tract of land hereinabove described; thence Southeasterly along said Westerly line of said tract of land to the place of beginning; containing Seven Thousand Three Hundred Seventy-nine (7,379) square feet, more or less;

Reserving unto Lessor and his assigns the right to use as a roadway the westerly thirty (30) feet of the demised premises running parallel to the West line of said premises and extending the entire length thereof.

To Have and to Hold the Above described premises unto the said Lessee for and during the term of One (1) year, commencing October 1, 1945 and ending September 30, 1946, to be occupied and used by said Lessee for the purpose of receiving, loading or unloading, transferring, shipping, dispatching or similarly dealing with freight carried by motor trucks and motor vehicles, and as a garage and repair shop and for all related purposes.

17 In Consideration of said demise and the covenants and agreements hereinafter mentioned, the parties hereto convenant and agree as follows:

1. Lessee agrees to pay as rent for said demised premises the sum of Ten Thousand Two Hundred Dollars ($10,200.00), payable in twelve (12) equal monthly installments as follows:

(a) Concurrently with or prior to the execution of this lease, Lessee has paid to Lessor the sum of Thirty-four Hundred Dollars ($3400.00) representing four (4) installments of rental. One of said four installments shall be deemed to be in payment of the rental for the month of October, 1945. The remaining three of said installments shall be considered to be and is a present payment of the rent reserved for the three months next preceding the expiration of the term of this lease, that is to say, for the months of July, August and September in the year 1946 and in no event shall be deemed to be a deposit or security for the payment of future installments of rental hereunder.

(b) The remaining eight installments of rental not covered by the aforesaid payment of Thirty-four Hundred Dollars ($3400.00) shall be in the amount of Eight Hundred Fifty Dollars ($850.00) each and be paid to Lessor on the first days of the months of November and December, 1945, and January, February, March, April, May and June, 1946.

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It is understood and agreed, in the event this lease shall be terminated prior to September 30, 1946, in accordance with the provisions of Paragraph 2 hereof, and if
18 Lessee shall have theretofore paid in advance, in either of the manners mentioned in (a) and (b) above, the rental for any month or months following such earlier termination date, then Lessor shall refund to Lessee promptly an amount equal to the aggregate payments of rental which shall have been so paid in advance with respect to the month or months following such date of earlier termination. However, Lessor shall have no obligation to refund any amount whatever to Lessee in the event this lease shall be terminated for cause by Lessor prior to the expiration of the said term, by reason of any default on the part of the Lessee or by violation of any provision of this lease by the Lessee.

2. The Lessor may at any time, upon at least ninety days' written notice to Lessee of his intention so to do, cancel and terminate this lease in the event of a bona fide sale by Lessor of the premises.

In the event, during the term of this lease, or the extension referred to in Paragraph 18 hereof, Lessor shall elect to sell the demised premises, then Lessee shall have the right of first refusal, that is to say, the first opportunity to purchase the premises upon the same terms and conditions, and for the same conditions as Lessor then proposes to sell the premises to any other individual, firm or corporation. In the event of any proposed sale, Lessor shall advise Lessee in writing of the name of the proposed purchaser, the terms and conditions of the proposed sale and the consideration therefor, and Lessee shall have ten days from the receipt of such notice within which to notify Lessor
19 of its election to purchase the demised premises upon like terms and conditions and for like consideration. In the event Lessee shall not deliver to Lessor, within said ten day period, a notice of its election to so purchase the premises, then Lessor shall be free to sell the premises to the person named in and on the same terms and conditions set forth in the notice first above mentioned, and this lease shall then be subject to termination by Lessor in the manner first above mentioned.

3. Lessee covenants and agrees to pay the rental hereby reserved, and in the manner and at the times hereinabove provided, at the office of the Lessor at 600 South Michigan

Avenue, Chicago, Illinois, or at such other place in the City of Chicago as said Lessor may from time to time designate in writing. All of said rentals shall be paid in lawful money of the United States of America.

4. Lessee agrees to repair and to replace at its own expense any doors, walls, partitions or other fixtures thereof, or any part of the improvements damaged or injured by Lessee or any other person in connection with the occupancy and use of said demised premises by Lessee, and to keep said premises in a clean and healthful condition, according to the ordinances of the City of Chicago and all applicable rules and regulations established by public authorities, provided, however, Lessee shall not be required hereby to make any change in the character or nature of any permanent improvement now on the premises. Upon the termination of this lease in any manner whatsoever, Lessee will yield up possession of said premises to Lessor in good condition and repair (loss by fire and ordinary wear excepted). Lessee further covenants and agrees that anyone authorized by Lessor shall have the right at all reasonable times, upon notice to the Lessee, to enter upon and examine said premises for the purpose of ascertaining for the benefit of Lessor whether the terms of this lease have been and are being complied with and for purpose of exercising any right or power granted to the Lessor under this lease.

5. Lessee agrees that it will not keep or use or permit to be kept within any part of the demised premises, any inflammable or explosive materials or liquids, excepting specifically those items which are being handled by the Lessee in the course of transportation or commerce, and further specifically excluding gasoline and oil contained in vehicles or instrumentalities for use in and about the premises in the course of Lessee's business of transportation. Lessee agrees that it will not sell or permit to be sold on the demised premises any gasoline, motor oil or motor vehicle fuels.

6. Lessee shall have the right and privilege in using, in common with others, the rail siding on the premises South and adjoining the demised premises, in so far as it is within Lessor's power to grant such use.

7. Lessee shall have the right to enter into sub-leases of the garage section of the building on the demised premises with individuals, firms or corporations engaged in the busi-

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ness of transporting freight by motor vehicle, provided, however, Lessee shall not solicit or deal with any tenant of American Terminal Company for the purpose of inducing any such tenant to rent space from Lessee in the place
21 and stead of dock space occupied under lease from American Terminal Company, and Lessee shall not have any right to sub-lease any part of the premises to any individual, firm or corporation which has been a tenant of American Terminal Company within a period of six months preceding any such attempted sub-leasing. Lessee shall have no right to assign this lease or to make and enter into any sub-lease other than a sub-lease of the garage, as aforesaid, without first obtaining the written consent of Lessor so to do.

8. In the event of the adjudication in bankruptcy or judicial reorganization of Lessee, or the appointment of a receiver of its property or business by any State or Federal Court, Lessor shall have the right, if it so elects, to terminate this lease upon, and within a reasonable time after, the happening of any of said events. Lessee further covenants and agrees that during the term of this lease it will not use, suffer or permit any person to use said premises or any part thereof, for any use or purpose in violation of the laws of the United States, the State of Illinois, or the ordinances of the City of Chicago, or for any purpose that will be injurious to the premises or increase the fire hazard of said building.

9. The Lessee agrees not to engage in or permit others to engage in the manufacture, sale or giving away of either spirituous, fermented or intoxicating liquors on said demised premises or on any part thereof, and agrees that it will, at all times, keep the demised premises and the Lessor harmless from any and all loss, liability, suits, claims, costs, expenses and damages resulting from or caused in whole or in part by the manufacture, sale, or giving away of alcoholic liquors in, upon or about the demised premises, whether
22 with or without the knowledge of Lessee, by any persons, firms or corporations whatsoever, whether such liability is based upon any statute of the State of Illinois, or upon the common law or otherwise, or arising out of the violation of any statute, ordinance, regulation or duty imposed by the common law or otherwise.

10. Lessee agrees that during the term of this lease it will not alter or cause to be altered any part of the demised

premises, nor will it construct or cause to be constructed any addition thereto or any improvement thereon, unless Lessee shall have obtained the written consent of Lessor so to do.

11. Lessee agrees that it will not permit any mechanic's lien or liens to be placed on said premises or any improvement thereon or addition thereto, during the term of this lease, and in case of the filing of any such lien Lessee will promptly pay the amount thereof and cause said lien to be discharged. If default in payment thereof shall continue for twenty (20) days after written notice thereof from Lessor to Lessee, the Lessor shall have the right and privilege, at Lessor's option, of paying and discharging the same or any portion thereof, without inquiring as to the validity thereof, and any amounts so paid, including expenses and interest, shall be so much additional indebtedness hereunder due from Lessee to Lessor, and shall be paid to Lessor immediately upon rendition of a bill therefor.

12. Lessee further covenants and agrees that if default shall at any time be made by it in payment of the rent when due as aforesaid and shall continue for ten (10) days after notice in writing thereof to Lessee, or if default shall be
23 made in any of the other covenants, agreements or undertakings herein contained to be kept, observed and performed by the Lessee, its successors or assigns, and such default shall continue for twenty (20) days after notice thereof in writing to the Lessee, it shall and may be lawful for the Lessor, at its election, to declare the said term ended and to re-enter the demised premises, or any part thereof, and to expel, remove and put out the Lessee and every person occupying the same, using such force as may be necessary in so doing, and to repossess the said premises, and to enjoy the same as in its first and former estate. Lessee agrees that notice of default hereinbefore provided may be given by delivering a written copy thereof to any officer or agent of Lessee on the premises, or by mailing the same registered mail, postage prepaid, to the last known address of Lessee.

13. If Lessee shall abandon or vacate said premises the same may be relet by Lessor (but no obligation is hereby imposed upon Lessor to relet) at such time and upon such terms as it may see fit; and if a sufficient sum shall not be thus realized monthly after paying the expenses of such reletting and collecting, to satisfy the rent hereby

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reserved, then Lessee agrees to satisfy and pay all deficiencies during each month of the period of this lease remaining after the premises have been so abandoned or vacated.

14. It is agreed that in the event the demised premises should be rendered untenantable by fire or any other casualty Lessor may at its option, within a reasonable time, either terminate this lease or elect to repair the permises within ninety (90) days after the happening of such fire or other casualty. In the event of termination by Lessor the Lessee shall not be liable for rental from and after the date of such fire. If the Lessor elects to rebuild, the Lessee's rental shall be abated for the period in which the demised premises are untenantable; provided, however, that if Lessor upon making such election fails to restore said premises within ninety (90) days after such fire or casualty the term hereby created shall cease and terminate.

15. Lessee shall not be required to pay any part of any general taxes or special assessments levied and assessed upon the demised premises. Lessee agrees to pay all water rents, gas and electric bills charged on said demised premises for and during the term of this lease.

16. Lessee will pay and discharge all reasonable costs, attorneys' fees and expenses that may be incurred by Lessor in enforcing the covenants and agreements of this lease, and all of said convenants and agreements shall be binding upon, apply and inure to the respective heirs, executors, successors, administrators and assigns of the parties to this lease.

17. Lessee also agrees that it will take out and keep in force during the term of this lease public liability insurance in the amount of not less than $50,000 in respect of injuries to any one person, and in the amount of not less than $100,000 in respect of any one accident or disaster, all in good and responsible companies satisfactory to the Lessor. All policies for such insurance shall be for the protection of both the Lessor and the Lessee, as their respective interests may appear, for any and all claims or loss or damage to any person or persons in connection with the demised premises. The policies of such insurance or certificates of insurance, and proof of payment of all premiums due thereon shall be lodged with the Lessor.

18. Lessee shall have the option of renewing this lease

for a period of one year following the expiration of the term hereof, which option shall be exercisable by Lessee by giving notice in writing to Lessor by registered mail at least sixty days prior to the expiration of said term.

19. It is understood that the demised premises are now occupied by Roosevelt Cartage Company. Lessor agrees to use his best efforts and at his own expense to cause said Roosevelt Cartage Company to vacate the premises prior to October 1, 1945, or as soon thereafter as possible, but in the event said Roosevelt Cartage Company should hold over after October 1, 1945, notwithstanding Lessor's best efforts to cause said company to vacate on or before that date, Lessor shall not be liable in damages to Lessee for any delay in placing Lessee in possession of the demised premises.

20. All notices required to be given under this lease shall be in writing. Notices directed to Lessee may be delivered to any officer or registered agent of Lessee or by registered mail to Lessee at 3201 South Iron Street, Chicago, Illinois. Notices directed to Lessor may be delivered to Lessor in person or by registered mail to his office at 600 South Michigan Avenue, Chicago, Illinois, or to such other address as Lessor may hereafter designate in writing.

In Testimony Whereof, the party of the first part has set his hand and seal hereto and the said Watson Bros. Transportation Co., Inc., a corporation, has hereunto caused its corporate seal to be affixed and these presents to be signed by its President and attested by its Secretary the day and year first above written.

Charles H. Morse, Jr., (Seal)
Lessor.

Witnessed By:
Samuel W. Witwer, Jr.

Watson Bros. Transportation Co.,
Inc., a Nebraska corporation,
Lessee,
By Fay V. Watson,
President.

Attest:
Wm. M. Wolfe,
Ass't Secretary Treasurer.

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27 "EXHIBIT B."

State of Nebraska, } ss.
County of Douglas. }

William M. Wolfe, being first duly sworn, deposes and says that he is the Vice-President of Watson Bros. Transportation Co., Inc., a corporation, (hereinafter sometimes referred to as "The Corporation") created under and by virtue of the laws of the State of Nebraska; and that:

1. That the Corporation is engaged in the business of transporting freight by motor or carrier throughout the midwestern states of the United States;

2. That the corporation maintains and operates a freight terminal at the premises commonly known as 3201 South Iron Street in the City of Chicago, County of Cook and State of Illinois; said premises being leased by the corporation from Central States Cooperatives, Inc., a District of Columbia Corporation;

3. The atoresaid terminal is the only one maintained and operated by the corporation in Chicago, Illinois and is vital to the defendant in the operation of the corporation's business; that this corporation has made diligent search and effort to secure a new freight terminal at Chicago, Illinois but is unable so to do, and no such terminal facilities are available in Chicago, Illinois until the expiration of the lease referred to in the petition for removal filed herein;

4. That the weekly tonnage handled by the corporation is approximately 5,000,000 pounds of freight per week in and outbound at Chicago, Illinois; that the Chicago terminal now used is vital to not only the shipments handled in Chicago, but is an integral part of a nationwide motor transportation system.

28 5. That the weekly gross revenue received by the corporation from the operations of the terminal above described located at Chicago, Illinois averages the sum of $40,000.00; and the net profits accruing to the corporation from its operations at the terminal located at Chicago, Illinois averages the sum of $1,200.00 per week; the estimated gross revenue received by the corporation in the operation of its terminal in Chicago, Illinois from October 1, 1946 to June 30, 1947 would amount to approximately

$1,560,000.00, and the total estimated profits accruing to the corporation for the said operations for the period from October 1, 1946 to June 30, 1947 will amount to approximately $43,200.00.

6. That should the lease between this corporation and Central States Cooperatives, Inc., a corporation, be terminated, this corporation will suffer a weekly loss of $1,200.00.

Wm. M. Wolfe.

Subscribed and sworn to before me this 11th day of October, 1946.

P. F. O'Donnell,
Notary Public.

(Seal)

My commission expires 3/1/1952.

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28½ "EXHIBIT C."

State of Illinois, } ss.
County of Cook. }

I, Mark Levy, being first duly sworn on oath, depose and say;

1. That I am a duly licensed real estate broker in the City of Chicago and State of Illinois;

2. That I was president of the Chicago Real Estate Board in 1931; President of the Cook County Real Estate Board in 1919; a member of the Valuation and Appraisal Committees of these Associations; that I am a member of the American Institute of Real Estate Appraisers; that I appraised all of the lands of the Chicago Elevated Railroads for the Chicago Traction and Subway Commission of the City of Chicago; appraised all of the owned and used lands and all of the unused lands and buildings thereon of the Chicago Rapid Transit Company in Chicago and elsewhere in Cook County, Illinois and also valued parts of the rights of way of the Chicago Junction Railroad, New York Central Lines; The Chicago, Aurora and Elgin Railroad, and the Chicago, Milwaukee and St. Paul Railroad, these valuations having been used in a rate case before The District County of the United States for the Northern District of Illinois; appraised all the lands of the Peoples Gas Light & Coke Company; appraised all of the lands of the Commonwealth Edison Company; during the past thirty-one years I have appraised property of all kinds and in all sections of Chicago and many other cities in the country; and in my appraisals during the past thirty-one years I have appraised a number of warehouse and truck terminal buildings;

3. That I am familiar with the property commonly
29 known as 3201 South Iron Street, Chicago, Illinois, more particularly described in the Statement of Claim filed in Municipal Court case No. 46 M 60387 entitled Central States Cooperatives, Inc., a District of Columbia corporation, plaintiff, *vs.* Watson Bros. Transportation, Inc., a Nebraska corporation, defendant, and in a lease dated July 31, 1945 by and between Charles H. Morse, Jr., and Watson Bros. Transportation Co., Inc., a Nebraska corporation; and I have made an inspection of the said

property for the purpose of determining the kind of construction, design, and other features thereof.

4. The above described property is improved with a one story brick building on concrete foundation with a small basement under the office portion of the building, housing the heating plant, consisting of a Pacific boiler, manufactured by the Pacific Boiler Corp., of Waukegan, Illinois, and Bristol, Pennsylvania. It is a steel heating boiler, asbestos covered, operated by a oil burner. There is also a steel hot water tank, not covered. Access to boiler is reached by basement entrance on the outside of the building. The north end of the building is a high wood truss roof brick building, cement floor, with a large door on the west and one on the south. Adjoining this section on the south is the in-going and out-going freight building. At the north end of the building are offices of the company, which comprise about 6 offices. Then to the south is the loading and unloading building, which has 34 receiving doors, 17 on the west side and 17 on the east side of the building.

30 5. That the dimensions of the building are as follows:

Transfer & Terminal Bldg.—200.7 ft. x 32 ft.—6,425.4 sq. ft. x 17.1 ft.	110,074 cu. ft.
North Unit Repair Shop & Warehouse—100 x 100 ft.—10,000 sq. ft. x 25½ ft.	255,000 cu. ft.
Boiler Room Bsmt.—18.8 x 10.6 ft.—199.2 sq. ft. x 7 ft.	1,394 cu. ft.
Stack—3.3 x 3.3 ft.—10.8 sq. ft. x 20 ft.	215 cu. ft.
	366,684 cu. ft.

Floor area—1st floor	16,425 sq. ft.
Basement	199 sq. ft.
	16,624 sq. ft.

6. In my opinion, the fair market value of the above described property, and the improvements thereon, in Chicago, Illinois, as of the month of October, 1946, free and clear from any encumbrances of any leasehold, and available for occupancy, is the sum of $105,000.00;

7. That the fair market value of the same above described property and the improvements thereon as of the

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month of October, 1946, but subject to a lease running from October 1, 1946, to June 30, 1947, at a monthly rental of $850.00 is the sum of $100,000.00.

Mark Levy (signed)

Subscribed and sworn to before me this 14th day of October, 1946.

Stanley Roe (signed)
(Seal) *Notary Public.*

31 And on the same day on, to wit, the 14th day of November, 1946 as a portion of said record there was filed in the Clerk's office of said District Court a certain Removal Bond in words and figures following, to wit:

32 IN THE MUNICIPAL COURT OF CHICAGO.
* * (Caption—46-M-60387) * *

REMOVAL BOND.

Know All Men By These Presents, That Watson Bros. Transportation Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Nebraska, as principal, and United States Fidelity and Guaranty Company, a Maryland Corporation, as surety, are held and firmly bound unto the Central States Cooperatives, Inc., a District of Columbia corporation, its successors and assigns, in the penal sum of One Thousand Dollars ($1,000.00) for the payment hereof, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

The Condition of this bond is such that

Whereas, the said Watson Bros. Transportation Company, Inc., a corporation has petitioned the Municipal Court of Chicago for the removal of a certain cause therein pending wherein the said Central States Cooperatives, Inc., a corporation, is plaintiff and the said Watson Bros. Transportation Company, Inc., a corporation, is defendant, in cause No. 46M60387, to the United States District Court for the Northern District of Illinois, Eastern Division;

Now, if the said Watson Bros. Transportation Company, Inc. a corporation, shall enter in the said United States District Court for the Northern District of Illinois, Eastern

Division, within thirty (30) days from the time of the filing of the said Petition for Removal, a certified copy of the record in said cause and shall well and truly pay all the costs that may be assessed by the said United States District Court for the Northern District of Illinois,
33 Eastern Division, if the said Court shall hold that the said suit wrongfully and improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, the principal and surety have signed and sealed this bond this 14th day of October, 1946.

Watson Bros. Transportation Company, Inc.,
A Nebraska Corporation
Principal

By Wm. M. Wolfe (Seal)

Attest:
P. F. O'Donnell,
(Seal) *Asst. Secy. Treas.*

United States Fidelity and Guaranty Company, A Maryland Corporation,
Surety.

By C. Lewis (Seal)
Attorney in Fact.

Approved and Accepted this ..... day of October, 1946.

.....
Judge.

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34 And on the same day on, to wit, the 14th day of November, 1946 as a portion of said record there was filed in the Clerk's office of said District Court a certain Affidavit of William M. Wolfe, in words and figures following, to wit:

35 IN THE MUNICIPAL COURT OF CHICAGO.
* * (Caption—46-M-60387) * *

AFFIDAVIT.

William M. Wolfe, being first duly sworn on oath, deposes and says that he is the Vice-President of Watson Bros. Transportation Co., a Nebraska Corporation, defendant in the above entitled cause; that he has read the Petition for Removal filed herein on October 15, 1946, and is familiar with the contents thereof; that all the allegations therein contained are true and correct.

William M. Wolfe.

Subscribed and sworn to before me this 21st day of October, 1946.

Dorothy Shank,
Notary Public.

(Seal)

36 And on the same day on, to wit, the 14th day of November, 1946 as a portion of said record there was filed in the Clerk's office of said District Court a certain Order entered by Honorable Victor A. Kula, Judge, on October 15, 1946, in words and figures following, to wit:

37 IN THE MUNICIPAL COURT OF CHICAGO.
* * (Caption—46-M-60387) * *

ORDER.

This cause coming on to be heard upon the petition of Watson Bros. Transportation Co., Inc., a Nebraska Corporation, the defendant in the above entitled cause, for an order removing this cause to the United States District Court for the Northern District of Illinois, Eastern Division, and it appearing to this Court that defendant has

filed its petition for such removal in due form and within the required time and that defendant has filed its bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition had prior to the filing thereof been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the statutes, and it appearing to this court that this is a proper cause for removal to the said United States District Court for the Northern District of Illinois; Eastern Division, this Court does now hereby accept and approve said bond and said petition and does Order this cause to be removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to section 28 of the Judicial Code of the United States and that all other proceedings of this Court be stayed and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Enter:

Victor A. Kula,
Judge.

October 15, 1946.

38 And on the same day on, to wit, the 14th day of November 1946 there was filed in the Clerk's office of said Court a certain Security Bond for Costs in words and figures following, to wit:

39 DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

.....Term, 19.....

Central States Cooperatives, Inc., a District of Columbia corporation,
Plaintiff,
vs.
Watson Bros. Transportation Company Inc., a Nebraska corporation,
Defendant.
} In 46 C 1886

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Defendant of any cost ordered or adjudged to be paid by Defendant we hereby agree and stipulate that execution may issue against Defendant's property for all costs not exceeding two hundred dollars taxed against Defendant.

Dated this 12th day of November, A. D. 1946.

United States Fidelity and Guaranty Company, a Maryland corporation.
By C. Lewis,
Attorney in Fact.

(Seal)

State of Illinois, } ss:
County of Cook. }

I, Blanche Bernstein, a Notary Public in and for the County and State aforesaid, do hereby certify that C. Lewis Attorney-in-fact of the United States Fidelity and Guaranty Company, who is personally known to me to be the same person whose name is subscribed in the foregoing instrument, as such Attorney-in-fact, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, and as the free and voluntary act of the said United States Fidelity and Guaranty Company for the uses and purposes therein set forth, and caused the corporate seal of the said Company to be thereto attached.

Given under my hand and Notarial seal this 12th day of November, A. D. 1946.

Blanche Bernstein,
Notary Public.

(Seal)

My Commission expires August 25, 1949.

And afterwards on, to wit, the 19th day of November, 1946 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

ANSWER.

Now comes Watson Bros. Transportation Company, Inc., a corporation, defendant herein, by its attorneys, Sherwin & Sherwin in answer to the plaintiff's complaint filed herein, and alleges the following;

1. Defendant denies the allegations contained in the paragraph one of the said complaint;

2. Defendant denies the allegations contained in paragraph two of the said complaint;

3. Further answering the said complaint, the defendant

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alleges that it is lawfully in possession of the premises described in the said complaint by reason of the fact that it entered into an oral agreement with the plaintiff through its proper officers and agents; and has performed all the terms and conditions of the said agreement; that this defendant has been in possession of the premises under a lease dated July 31, 1945 by and between Charles H. Morris, Jr., and Watson Bros. Transportation Co. Inc., as Lessee, a copy of which is hereto attached, and by this reference made a part hereof, said copy being marked "Exhibit A";

44 That the said lease gave an option on the part of your petitioner to purchase said property prior to the right of any other party to purchase during the term of said lease; that prior to the expiration date of said lease, the plaintiff made an offer for the purchase of the said property, which is more particularly described in the said lease, and the defendant, through its proper officers and agents, communicated with the plaintiff and advised the plaintiff that unless an arrangement could be worked out whereby the defendant could remain in possession of the premises for the nine month period commencing October 1, 1946 to June 30, 1947 this defendant would exercise the option to purchase provided for in the said lease;

That thereafter the plaintiff, through its proper officers and agents, entered into an oral agreement with the defendant whereby it was agreed that in consideration of the agreement of the defendant to refrain from exercising its option to purchase, the plaintiff would permit the defendant to remain in possession of the premises for the nine month period from October 1, 1946 to June 30, 1947; that the monthly rental for such possession was to be the sum of Eight Hundred Fifty Dollars ($850.00); that by reason of the said agreement this defendant did refrain from exercising its right to purchase the premises and has remained in possession of the said premises and the plaintiff did purchase and acquire title to the said premises;

That this defendant has performed all the terms and conditions required by it to be performed under the said oral agreement with the plaintiff, and has tendered all rent due the said oral agreement to the plaintiff, and is thereby lawfully in possession of the said premises;

Wherefore, defendant prays that the complaint filed herein by the plaintiff, be dismissed and that judgment be entered in favor of the defendant.

Watson Bros. Transportation Company, Inc.,
By Sherwin & Sherwin,
Its Attorneys,
By Theodore R. Sherwin.

Sherwin & Sherwin,
209 South LaSalle Street,
Chicago, Illinois,
Telephone: Central 2010
Attorneys for the Defendant.

45 "EXHIBIT A."

This Indenture made this 31st day of July, A. D. 1945, by and between Charles H. Morse, Jr., of the Village of Libertyville, Lake County, Illinois, party of the first part (hereinafter referred to as "Lessor") and Watson Bros. Transportation Co., Inc., a Nebraska corporation, with office and place of business in the City of Chicago, Illinois, party of the second part (hereinafter referred to as "Lessee"), Witnesseth:

In consideration of the rents herein reserved and of the covenants and agreements herein contained on the part of the Lessee to be kept, observed and performed, Lessor has demised and leased and does by these presents demise and lease unto the Lessee the following premises:

That part of the North Half (N½) of the Northwest quarter (NW¼) of Section Thirty-two (32) Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian, in the County of Cook, State of Illinois, more particularly described as follows:

Beginning at a point which is the intersection of the center line of vacated Iron Street as it exists South of vacated West 33rd Street where it is Fifty (50) feet wide, extended Northwesterly, with the North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to the Westerly dock line of the South Fork of the South Branch of the Chicago River, as occupied; thence

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North Forty-one degrees, thirty minutes, thirty seconds (41° 30′ 30″) West, One hundred Sixty-six (166) feet, Eight and One-eighth (8⅛) inches; thence North Thirty-two degrees, Forty-seven minutes (32° 47′) West, Sixty-three (63) feet, Four and one-half (4½) inches; thence North Twenty-nine degrees, forty-six minutes, Twenty seconds (29° 46′ 20″) West, One Hundred Twenty (120) feet, Eleven and one-half (11½) inches, more or less along said dock line as occupied to a line formed by the extension East of the South line of Lot Eight (8) of Shepard & Decreet's Subdivision of Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23), in Alice Lynch's Subdivision in the Northwest quarter (NW¼) of Section thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty-eight (288) feet, Nine and Five-eighths (9⅝) inches, more or less, to the intersection of said line with the center line of vacated Iron Street as it exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along the said center line of vacated Iron Street (as it exists South of vacated West 33rd Street extended Northwesterly), Four Hundred Ninety-eight (498) feet and Nine (9) inches to the place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet more or less; except therefrom a tract of land bounded by a line described as follows:

Beginning at the point of beginning of the tract of land hereinabove described; thence Northeasterly on the Southerly line thereof Forty-nine (49) feet Ten and one-half (10½) inches to the East line of vacated Iron Street North of vacated West 33rd Street; thence Northwesterly along the said Easterly line of vacated Iron Street Three Hundred (300) feet, Seven-eighths (⅞) inches more or less to the intersection of said East line with the Westerly line of the tract of land hereinabove described; thence Southeasterly along said Westerly line of said tract of land to the place of beginning; containing Seven Thousand Three Hundred Seventy-nine (7,379) square feet, more or less;

Reserving unto Lessor and his assigns the right to use as a roadway the westerly thirty (30) feet of the demised premises running parallel to the West line of said premises and extending the entire length thereof.

To Have And To Hold The Above described premises unto the said Lessee for and during the term of One (1)

year, commencing October 1, 1945 and ending September 30, 1946, to be occupied and used by said Lessee for the purpose of receiving, loading or unloading, transferring, shipping, dispatching or similarly dealing with freight carried by motor trucks and motor vehicles, and as a garage and repair shop and for all related purposes.

47 In Consideration of said demise and the covenants and agreements hereinafter mentioned, the parties hereto covenant and agree as follows:

1. Lessee agrees to pay as rent for said demised premises the sum of Ten Thousand Two Hundred Dollars ($10,200.00), payable in twelve (12) equal monthly installments as follows:

(a) Concurrently with or prior to the execution of this lease, Lessee has paid to Lessor the sum of Thirty-four Hundred Dollars ($3400.00) representing four (4) installments of rental. One of said four installments shall be deemed to be in payment of the rental for the month of October, 1945. The remaining three of said installments shall be considered to be and is a present payment of the rent reserved for the three months next preceding the expiration of the term of this lease, that is to say, for the months of July, August and September in the year 1946 and in no event shall be deemed to be a deposit or security for the payment of future installments of rental hereunder.

(b) The remaining eight installments of rental not covered by the aforesaid payment of Thirty-four Hundred Dollars ($3400.00) shall be in the amount of Eight Hundred Fifty Dollars ($850.00) each and be paid to Lessor on the first days of the months of November and December, 1945, and January, February, March, April, May and June, 1946.

It is understood and agreed, in the event this lease shall be terminated prior to September 30, 1946, in accordance with the provisions of Paragraph 2 hereof, and if Les-

48 see shall have theretofore paid in advance, in either of the manners mentioned in (a) and (b) above, the rental for any month or months following such earlier termination date, then Lessor shall refund to Lessee promptly an amount equal to the aggregate payments of rental which shall have been so paid in advance with respect to the month or months following such date of earlier termination. However, Lessor shall have no obligation to refund any amount whatever to Lessee in the event this lease shall be terminated for cause by Lessor prior to the expiration of

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the said term, by reason of any default on the part of the Lessee or by violation of any provision of this lease by the Lessee.

2. The Lessor may at any time, upon at least ninety days' written notice to Lessee of his intention so to do, cancel and terminate this lease in the event of a bona fide sale by Lessor of the premises.

In the event, during the term of this lease, or the extension referred to in Paragraph 18 hereof, Lessor shall elect to sell the demised premises, then Lessee shall have the right of first refusal, that is to say, the first opportunity to purchase the premises upon the same terms and conditions, and for the same conditions as Lessor then proposes to sell the premises to any other individual, firm or corporation. In the event of any proposed sale, Lessor shall advise Lessee in writing of the name of the proposed purchaser, the terms and conditions of the proposed sale and the consideration therefor, and Lessee shall have ten days from the receipt of such notice within which to notify Lessor of
49 its election to purchase the demised premises upon like terms and conditions and for like consideration. In the event Lessee shall not deliver to Lessor, within said ten day period, a notice of its election to so purchase the premises, then Lessor shall be free to sell the premises to the person named in and on the same terms and conditions set forth in the notice first above mentioned, and this lease shall then be subject to termination by Lessor in the manner first above mentioned.

3. Lessee covenants and agrees to pay the rental hereby reserved, and in the manner and at the times hereinabove provided, at the office of the Lessor at 600 South Michigan Avenue, Chicago, Illinois, or at such other place in the City of Chicago as said Lessor may from time to time designate in writing. All of said rentals shall be paid in lawful money of the United States of America.

4. Lessee agrees to repair and to replace at its own expense any doors, walls, partitions or other fixtures thereof, or any part of the improvements damaged or injured by Lessee or any other person in connection with the occupancy and use of said demised premises by Lessee, and to keep said premises in a clean and healthful condition, according to the ordinances of the City of Chicago and all applicable rules and regulations established by public authorities, provided, however, Lessee shall not be required

hereby to make any change in the character or nature of any permanent improvement now on the premises. Upon the termination of this lease in any manner whatsoever, Lessee will yield up possession of said premises to Lessor in good condition and repair (loss by fire and ordinary wear excepted). Lessee further covenants and agrees that anyone authorized by Lessor shall have the right at all reasonable times, upon notice to the Lessee, to enter upon and examine said premises for the purpose of ascertaining for the benefit of Lessor whether the terms of this lease have been and are being complied with and for purpose of exercising any right or power granted to the Lessor under this lease.

5. Lessee agrees that it will not keep or use or permit to be kept within any part of the demised premises, any inflammable or explosive materials or liquids, excepting specifically those items which are being handled by the Lessee in the course of transportation or commerce, and further specifically excluding gasoline and oil contained in vehicles or instrumentalities for use in and about the premises in the course of Lessee's business of transportation. Lessee agrees that it will not sell or permit to be sold on the demised premises any gasoline, motor oil or motor vehicle fuels.

6. Lessee shall have the right and privilege in using, in common with others, the rail siding on the premises South and adjoining the demised premises, in so far as it is within Lessor's power to grant such use.

7. Lessee shall have the right to enter into sub-leases of the garage section of the building on the demised premises with individuals, firms or corporations engaged in the business of transporting freight by motor vehicle, provided, however, Lessee shall not solicit or deal with any tenant of American Terminal Company for the purpose of inducing any such tenant to rent space from Lessee in the place and stead of dock space occupied under lease from American Terminal Company, and Lessee shall not have any right to sub-lease any part of the premises to any individual, firm or corporation which has been a tenant of American Terminal Company within a period of six months preceding any such attempted sub-leasing. Lessee shall have no right to assign this lease or to make and enter into any sub-lease other than a sub-lease of the garage, as

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aforesaid, without first obtaining the written consent of Lessor so to do.

8. In the event of the adjudication in bankruptcy or judicial reorganization of Lessee, or the appointment of a receiver of its property or business by any State or Federal Court, Lessor shall have the right, if it so elects, to terminate this lease upon, and within a reasonable time after, the happening of any of said events. Lessee further covenants and agrees that during the term of this lease it will not use, suffer or permit any person to use said premises or any part thereof, for any use or purpose in violation of the laws of the United States, the State of Illinois, or the ordinances of the City of Chicago, or for any purpose that will be injurious to the premises or increase the fire hazard of said building.

9. The Lessee agrees not to engage in or permit others to engage in the manufacture, sale or giving away of either spirituous, fermented or intoxicating liquors on said demised premises or on any part thereof, and agrees that it will, at all times, keep the demised premises and the Lessor harmless from any and all loss, liability, suits, claims, costs, expenses and damages resulting from or caused in whole or in part by the manufacture, sale, or giving away of alcoholic liquors in, upon or about the demised premises, whether with or without the knowledge of Les-
52 see, by any persons, firms or corporations whatsoever, whether such liability is based upon any statute of the State of Illinois, or upon the common law or otherwise, or arising out of the violation of any statute, ordinance, regulation or duty imposed by the common law or otherwise.

10. Lessee agrees that during the term of this lease it will not alter or cause to be altered any part of the demised premises, nor will it construct or cause to be constructed any addition thereto or any improvement thereon, unless Lessee shall have obtained the written consent of Lessor so to do.

11. Lessee agrees that it will not permit any mechanic's lien or liens to be placed on said premises or any improvement thereon or addition thereto, during the term of this lease, and in case of the filing of any such lien Lessee will promptly pay the amount thereof and cause said lien to be discharged. If default in payment thereof shall continue for twenty (20) days after written notice thereof from Lessor to Lessee, the Lessor shall have the right and

privilege, at Lessor's option, of paying and discharging the same or any portion thereof, without inquiring as to the validity thereof, and any amounts so paid, including expenses and interest, shall he so much additional indebtedness hereunder due from Lessee to Lessor, and shall be paid to Lessor immediately upon rendition of a bill therefor.

12. Lessee further covenants and agrees that if default shall at any time be made by it in payment of the rent when due as aforesaid and shall continue for ten (10) days after notice in writing thereof to Lessee, or if default shall
53 be made in any of the other covenants, agreements or undertakings herein contained to be kept, observed and performed by the Lessee, its successors or assigns, and such default shall continue for twenty (20) days after notice thereof in writing to the Lessee, it shall and may be lawful for the Lessor, at its election, to declare the said term ended and to reenter the demised premises, or any part thereof, and to expel, remove and put out the Lessee and every person occupying the same, using such force as may be necessary in so doing, and to repossess the said premises, and to enjoy the same as in its first and former estate. Lessee agrees that notice of default hereinbefore provided may be given by delivering a written copy thereof to any officer or agent of Lessee on the premises, or by mailing the same registered mail, postage prepaid, to the last known address of Lessee.

13. If Lessee shall abandon or vacate said premises the same may be relet by Lessor (but no obligation is hereby imposed upon Lessor to relet) at such time and upon such terms as it may see fit; and if a sufficient sum shall not be thus realized monthly after paying the expenses of such reletting and collecting, to satisfy the rent hereby reserved, then Lessee agrees to satisfy and pay all deficiencies during each month of the period of this lease remaining after the premises have been so abandoned or vacated.

14. It is agreed that in the event the demised premises should be rendered untenantable by fire or any other casualty Lessor may at its option, within a reasonable time, either terminate this lease or elect to repair the premises within ninety (90) days after the happening of such
54 fire or other casualty. In the event of termination by Lessor the Lessee shall not be liable for rental from and after the date of such fire. If the Lessor elects to

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rebuild, the Lessee's rental shall be abated for the period in which the demised premises are untenantable; provided, however, that if Lessor upon making such election fails to restore said premises within ninety (90) days after such fire or casualty the term hereby created shall cease and terminate.

15. Lessee shall not be required to pay any part of any general taxes or special assessments levied and assessed upon the demised premises. Lessee agrees to pay all water rents, gas and electric bills charged on said demised premises for and during the term of this lease.

16. Lessee will pay and discharge all reasonable costs, attorneys' fees and expenses that may be incurred by Lessor in enforcing the covenants and agreements of this lease, and all of said covenants and agreements shall be binding upon, apply and inure to the respective heirs, executors, successors, administrators and assigns of the parties to this lease.

17. Lessee also agrees that it will take out and keep in force during the term of this lease public liability insurance in the amount of not less than $50,000 in respect of injuries to any one person, and in the amount of not less than $100,000 in respect of any one accident or disaster, all in good and responsible companies satisfactory to the Lessor. All policies for such insurance shall be for the protection of both the Lessor and the Lessee, as their respective interests may appear, for any and all claims or loss or damage to any person or persons in connection with the demised premises. The policies of such insurance or certificates of insurance, and proof of payment of all premiums due thereon shall be lodged with the Lessor.

18. Lessee shall have the option of renewing this lease for a period of one year following the expiration of the term hereof, which option shall be exercisable by Lessee by giving notice in writing to Lessor by registered mail at least sixty days prior to the expiration of said term.

19. It is understood that the demised premises are now occupied by Roosevelt Cartage Company. Lessor agrees to use his best efforts and at his own expense to cause said Roosevelt Cartage Company to vacate the premises prior to October 1, 1945, or as soon thereafter as possible, but in the event said Roosevelt Cartage Company should hold over after October 1, 1945, notwithstanding

Lessor's best efforts to cause said company to vacate on or before that date, Lessor shall not be liable in damages to Lessee for any delay in placing Lessee in possession of the demised premises.

20. All notices required to be given under this lease shall be in writing. Notices directed to Lessee may be delivered to any officer or registered agent of Lessee or by registered mail to Lessee at 3201 South Iron Street, Chicago, Illinois. Notices directed to Lessor may be delivered to Lessor in person or by registered mail to his office at 600 South Michigan Avenue, Chicago, Illinois,
56 or to such other address as Lessor may hereafter designate in writing.

In Testimony Whereof, the party of the first part has set his hand and seal hereto and the said Watson Bros. Transportation Co., Inc., a corporation, has hereunto caused its corporate seal to be affixed and these presents to be signed by its President and attested by its Secretary the day and year first above written.

Charles H. Morse, Jr., (Seal)
Lessor.

Witnessed by:
Samuel W. Witwer, Jr.

Watson Bros. Transportation Co., Inc., a Nebraska corporation,
Lessee,

By Fay V. Watson,
President.

Attest:
Wm. M. Wolfe,
Asst. Secretary-Treas.

57 And afterwards on, to wit, the 25th day of November, 1946, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice, in words and figures following, to wit:

58 In the District Court of the United States.
* * (Caption—46-C-1886) * *

NOTICE.

To: Sherwin & Sherwin, 209 S. La Salle St., Suite 915, Chicago, Illinois.

You Will Please Take Notice that on Monday, the 25th day of November, A. D. 1946, at the opening of court in the forenoon or as soon thereafter as counsel may be heard, we shall appear before his Honor, Judge Elwyn R. Shaw, in the room usually occupied by him as a courtroom in the U. S. Court House, Chicago, Illinois, or before such other judge as may be sitting in his place and stead, and shall then and there move the court for leave to file instanter the amended complaint, copy of which is herewith served upon you, and for a rule on the defendant to answer within a short day.

At Which Time And Place you may appear if you so see fit.

Brenner & McBride,
Attorneys for Plaintiff,
100 N. LaSalle St.,
Chicago, Illinois,
Telephone Randolph 4477.

Received a copy of the above notice together with a copy of said amended complaint, this 22nd day of November, A. D. 1946.

Sherwin & Sherwin.

59 And on the same day, to wit, on the 25th day of November, 1946, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

60 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

It Is Ordered by the Court that leave be and it is hereby given to the plaintiff to file instanter an amended complaint and

It Is Further Ordered that rule be and it is hereby entered on the defendant to answer within ten (10) days from this date said amended complaint.

61 And on the same day on, to wit, the 25th day of November, 1946 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Amended Complaint in words and figures following, to wit:

62 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

AMENDED COMPLAINT.

Now comes the plaintiff, Central States Cooperatives, Inc., by Brenner & McBride its attorneys and by leave of court first had and obtained files this, its amended complaint at law herein and alleges as follows:

(1) That Central States Cooperatives, Inc., a District of Columbia corporation, is and has been since the 25th day of June, 1946, the owner of the legal title in fee simple in and to the real estate and premises situated in the city of Chicago, County of Cook and State of Illinois, described as follows, to-wit:

That part of the North Half (N½) of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of

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the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street, as it exists South of vacated West 33rd Street, which is Fifty (50) feet wide, extended Northwesterly with North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to Westerly dock line of South fork of South branch of Chicago River, as occupied; thence North Forty-one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One hundred sixty-six (166) feet Eight and one-eighth (8 1/8) inches; thence North Thirty-two (32) degrees, Forty-seven (47) minutes West, Sixty-three (63) feet Four and one-half (4½) inches; thence North Twenty-nine (29) degrees, Forty-six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and one-half (11½) inches more or less along said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decreet's Subdivision of Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Alice Lynch's Subdivision of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty-eight (288) feet Nine and Five-eighths (9 5/8) inches more or less to intersection of said line with center line of vacated Iron
63 Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of vacated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred Ninety-eight (498) feet and Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet, more or less;

having derived title to the said premises by warranty deed from Charles H. Morse, Jr. and Vesta C. Morse, his wife, dated and duly acknowledged on June 25, 1946 and recorded in the Recorder's Office of Cook County, Illinois, on July 8, 1940 as Document No. 13838043.

(2) That upon taking title to the said premises, the same was subject to an indenture otherwise known as a lease, dated July 31, 1945 by and between Charles H. Morse, Jr., as lessor and Watson Bros. Transportation

Co., Inc., a Nebraska corporation, as lessee, defendant herein, whereby the said lessor demised and leased to the said lessee the above described premises, excepting therefrom a tract of land bounded by a line described as follows:

Beginning at the point of beginning of the tract of land hereinabove described; thence, Northeasterly on the Southerly line thereof Forty-nine (49) feet Ten and one-half (10½) inches to the East line of vacated Iron Street North of vacated West 33rd Street; thence Northwesterly along the said Easterly line of vacated Iron Street Three Hundred (300) feet, Seven-eighths (⅞) inches more or less to the intersection of said East line with the Westerly line of the tract of land hereinabove described; thence Southeasterly along said Westerly line of said tract of land to the place of beginning; containing Seven Thousand Three Hundred Seventy-nine (7,379) square feet, more or less; which said lease made the further reservation:

Reserving unto Lessor and his assigns the right to use as a roadway the westerly thirty (30) feet of the demised premises running parallel to the West line of said premises and extending the entire length thereof;

for and during the term of one year commencing October 1, 1945 and ending September 30, 1946, to be occupied and used by said lessee for the purpose of receiving, loading or unloading, transferring, shipping, dispatching or similarly dealing with freight carried by motor trucks and motor vehicles, and as a garage and repair shop and for all related purposes.

64 (3) That the said lease provided, among other things, as follows:

"2. The Lessor may at any time, upon at least ninety days' written notice to Lessee of his intention so to do, cancel and terminate this lease in the event of a bona fide sale by Lessor of the premises.

"In the event, during the term of this lease, or the extension referred to in Paragraph 18 hereof, Lessor shall elect to sell the demised premises, then Lessee shall have the right of first refusal, that is to say, the first opportunity to purchase the premises upon the same terms and conditions, and for the same conditions as Lessor then proposes to sell the premises to any other individual, firm or corporation. In the event of any proposed sale, Lessor shall advise Lessee in writing of the name of the proposed purchaser, the terms and conditions of the proposed sale

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and the consideration therefor, and Lessee shall have ten days from the receipt of such notice within which to notify Lessor of its election to purchase the demised premises upon like terms and conditions and for like consideration. In the event Lessee shall not deliver to Lessor, within said ten day period, a notice of its election to so purchase the premises, then Lessor shall be free to sell the premises to the person named in and on the same terms and conditions set forth in the notice first above mentioned, and this lease shall then be subject to termination by Lessor in the manner first above mentioned."

(4) That Charles H. Morse, Jr., the said lessor, did elect on May 27, 1946 to sell the demised premises to Central States Cooperatives, Inc., for the sum of One Hundred Thousand Dollars ($100,000.00) cash and on May 28, 1946 gave notice in writing to the defendant as lessee of such intention and of all of the terms and conditions of such proposed sale and gave to the said lessee the right of first refusal and the first opportunity to purchase the premises upon the same terms and conditions; that the defendant, as lessee, did not within ten days of the receipt of such notice, or at any other time, notify said Charles H. Morse, Jr., as lessor of any election to purchase the premises upon like terms and conditions and for like consideration, or otherwise; that thereby the said Charles H. Morse, Jr., as lessor was free to sell the said premises and to sell the said premises to the Central States Cooperatives, Inc., plaintiff herein, upon the same terms and conditions set forth in the above mentioned notice.

(5) That on June 10, 1946, after the expiration of the ten day period of the said lessee's right of first refusal, Charles H. Morse, Jr., the said lessor did give written notice to the defendant as lessee of his intention to
65 terminate and to cancel and terminate the said lease, effective September 30, 1946, more than ninety days from the date of the said notice of termination.

(6) That the said lease also provided, among other things, as follows:

"18. Lessee shall have the option of renewing this lease for a period of one year following the expiration of the term hereof, which option shall be exercisable by Lessee by giving notice in writing to Lessor by registered mail at least sixty days prior to the expiration of said term."

(7) That the said defendant, as lessee, did not exercise such option of renewing the said lease by giving notice in writing to the lessor by registered mail at least sixty days prior to the expiration of the said term, or in any other manner.

(8) That by reason of the above facts the lease of the defendant in and to the above described premises expired on September 30, 1946.

(9) That on June 7, 1946 the plaintiff herein made an offer in writing to make a lease to the defendant of a portion of the premises described in paragraph two hereinabove, giving to the defendant the right to use and occupy the dock space (not including the garage and office) for use as a truck terminal, to become effective upon the plaintiff acquiring said premises, which said offer was in words and figures as follows, to-wit:

June 7, 1946

"Watson Bros. Transportation Co., Inc.,
3201 S. Iron Street,
Chicago, Illinois.

"Gentlemen:

"We wish to advise that as attorneys for Central States Cooperatives, Inc., we have been requested to draft a lease to become effective upon Central States Cooperatives, Inc. acquiring the terminal property commonly described as 3201 S. Iron Street, Chicago, Illinois, from Central States Cooperatives, Inc., as lessor and Watson Bros. Transportation Co., Inc. as lessee, for the term ending December 31, 1946, with an option to lessee on sixty days' notice of renewal for one year to December 31, 1947, giving to Watson Bros. the right to use and occupy the dock space (not including the garage and office) for use as a truck terminal, at a monthly rental of $450.00 a month, payable on the 1st of each month, to and including December, 1946 and for $650.00 a month during the option period to and including the month of December, 1947, replacing the present lease to Watson Bros. Transportation Co., Inc. as lessee from Charles H. Morse, Jr. as lessor.

"As soon as Central States Cooperative, Inc. acquires title to the property and not later than July 15, 1946, if Central States Cooperative, Inc. completes the acquisition of the property by that time, Central States Cooperative,

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Inc. will occupy the garage and office space on said
66 premises except the dock space being rented to Watson Bros. Transportation Co., Inc. for a terminal.

"The remaining terms and conditions will be such as may be mutually agreed upon.

Yours very truly,

TGMcB:D Thomas G. McBride"

"Approved:
Central States Cooperatives, Inc.
By L. L. Lehtin"

that said written offer was delivered in person to William Wolf, Vice President of the defendant, with the understanding that such offer was to remain open for a few days; that the said offer was not accepted by the defendant within a few days or at any time.

(10) That on June 25, 1946 the plaintiff caused the following letter to be addressed and delivered to the defendant by registered mail:

June 25,1946

"Watson Bros. Transportation Co., Inc.,
802 South 14th Street,
Omaha, Nebraska.

"Gentlemen:

"On June 7th we addressed a letter to you, proposing the making of a lease and enclosing a draft of a lease from Central States Cooperatives, Inc., to your company for the dock space on the property at 3201 South Iron Street, Chicago, Illinois. These we delivered to Mr. William Wolf, your attorney, upon the request of Mr. Richter of Seay & Thomas, because we were given to understand that your company was ready to make such a lease. Mr. Wolf stated that he would write or call me within a few days.

"Mr. Richter wrote to Mr. Wolf on June 17th requesting a response. In view of the fact that we have not heard from you to this date we wish to advise that we feel obliged to and do withdraw the offer and proposal of such lease. This is in order that there will be no question as to our being free to negotiate with other persons for the leasing by Central States Cooperatives, Inc. of this dock space. We wish to advise that Central States Cooperatives, Inc. is not unwilling to enter into a lease with your company but if this is to be done we should have your acceptance'

of our proposal within five days of your receipt of this letter.

"If you are interested in continuing the premises, we suggest that you act in the matter promptly.

Yours very truly,

TGMcB:D Thomas G. McBride"

67 that no response was made by letter or otherwise by the defendant to the said letter.

(11) That on July 29, 1946 the plaintiff caused the following letter to be addressed and delivered to the defendant by registered mail:

July 29, 1946

"Watson Bros. Transportation Co., Inc.
802 S. 14th Street,
Omaha, Nebraska.

"Gentlemen:

"On June 29th, following my letter of June 25th, I had a telephone conversation with Mr. Wolf, relative to the possible making of a lease from Central States Cooperatives, Inc. to your Company for the dock space on the property at 3201 South Iron Street, Chicago. At the conclusion of this conversation, Mr. Wolf stated that he would talk to Mr. Watson and would let me know in a few days what they wanted to do. Thirty days have elapsed from this time without any communication from you by letter or otherwise. Central States Cooperatives has naturally assumed that you are not interested in remaining in the premises after September 30, 1946.

"This being the case we are in the course of making a lease with other prospective tenants for the occupancy of the dock space, beginning October 1, 1946. Since your present lease terminates September 30th we will expect you to vacate the premises on that date in order that Central States Cooperatives, Inc. may take possession of the same on October 1, 1946 and in order that the tenant of Central States Cooperatives may occupy the dock space on said property beginning October 1, 1946.

"This letter is written for the purpose of avoiding any possible misunderstanding with regard to the above premises.

Yours very truly,

TGMcB:D Thomas G. McBride"

that no response was made by letter or otherwise by the defendant to the said letter.

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(12) That by reason thereof the offer of the plaintiff of June 7, 1946 expired five days from June 27, 1946, the date of the receipt by the defendant of the letter of June 25, 1946; that no other offer was made by the plaintiff to the defendant orally or in writing for the lease of the said premises or any part thereof for any term of years or months or otherwise, and no agreement of lease orally or in writing was made at any time between the plaintiff and the defendant relating to the leasing by the plaintiff to the defendant of the said premises or any portion thereof for any term of years or months or otherwise.

68 (13) That by reason of the facts above stated the plaintiff is and has been since October 1, 1946 entitled to the possession of the premises described in paragraph 1 hereinabove.

(14) That the defendant wilfully and unlawfully withholds from the plaintiff possession of the premises hereinabove in paragraph 1 described and has from October 1, 1946 wilfully and unlawfully remained in possession of the premises hereinabove in paragraph 1 described and is a trespasser upon the said premises, without any legal right or authority whatever.

Wherefore, the plaintiff prays the judgment of the court that the plaintiff is entitled to the possession of the whole of the premises hereinabove referred to and that the defendant wilfully withholds possession of the same from the plaintiff and that execution issue in favor of the plaintiff and against the defendant for the possession of the said premises and that the plaintiff recover costs from the defendant.

Central States Cooperatives, Inc., a
District of Columbia corporation,
Plaintiff.

By Brenner & McBride,
Its attorneys,
By Thomas G. McBride.

Brenner & McBride,
Attorneys for plaintiffs,
100 North La Salle Street,
Chicago 2, Illinois.
Telephone Randolph 4477.

69 And on the same day on, to wit, the 25th day of November, 1946, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Jury Demand in words and figures following, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

JURY DEMAND.

Watson Bros. Transportation Co., Inc., defendant herein, hereby demands a jury trial in the above entitled cause.

Watson Bros. Transportation Co., Inc.
A Nebraska Corporation,
Defendant.
By Sherwin & Sherwin,
Attorneys for Defendant,
209 South La Salle Street,
Chicago 4, Illinois,
Telephone: Central 2010
Attorneys for the Defendant,

71 And afterwards on, to wit, the 5th day of December, 1946, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Strike in words and figures following, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

MOTION TO STRIKE.

Now comes Watson Bros. Transportation Company, Inc., a corporation, defendant, by Sherwin & Sherwin, its attorneys, and moves the Court to strike the amended complaint of the plaintiff herein, and in support of the said motion, states the following:

1. That on the 25th day of November, 1946, the plaintiff filed its amended complaint herein;

2. That the said complaint is insufficient and defective as a matter of law in that:

(a) The said amended complaint violates the provi-

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sions of Rule 8a of the rules of Federal practice, in that it does not contain a short and plain statement of the claim showing that the plaintiff is entitled to relief;

(b) It violates Rule 8e of the rules of Federal practice in that it is not a simple, concise, and direct pleading;

(c) The amended complaint contains numerous allegations that are redundant, immaterial, unnecessary, argumentative, and constitute pleading of evidentiary matters;

3. In particular without limiting the generality of
73 the foregoing, paragraph number two is defective in that the said allegations in said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

4. In particular without limiting the generality of the foregoing, paragraph number four is defective in that the allegations in said paragraph are unnecessary, immaterial, redundant and argumentative and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

5. In particular without limiting the generality of the foregoing, paragraph number five is defective in that the allegations in said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

6. In particular without limiting the generality of the foregoing paragraph number six is defective in that the allegations in said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

7. In particular without limiting the generality of the foregoing, paragraph number seven is defective in that the allegations in said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

8. In particular without limiting the generality of the foregoing, paragraph number eight is defective in that the allegations in said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary to the presentation of the plaintiff's claim for relief, and constitutes the pleading of a conclusion.

9. In particular without limiting the generality of
74 the foregoing, paragraph number nine is defective in that the allegations in the said paragraph are unnecessary, immaterial, redundant, and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

10. In particular without limiting the generality of the foregoing, paragraph number ten is defective in that the allegations in the said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

11. In particular without limiting the generality of the foregoing, paragraph number eleven is defective in that the allegations in the said paragraph are unnecessary and immaterial and constitute a pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief.

12. In particular without limiting the generality of the foregoing, paragraph number twelve is defective in that the allegations in the said paragraph are unnecessary, immaterial, redundant, and constitute the pleading of purely evidentiary matters and are not necessary in the presentation of the plaintiff's claim for relief, and is an attempt to anticipate a defense on the part of the defendant.

Wherefore, Watson Bros. Transportation Company, Inc., defendant herein, moves the Court to strike the plaintiff's amended complaint for the reasons hereinabove alleged and for a rule on the plaintiff to file a proper and sufficient claim for relief.

Watson Bros. Transportation Co., Inc.,
A Nebraska Corporation, defendant,
By Sherwin & Sherwin,
Its Attorneys.
By Theodore R. Sherwin (s/d)

Sherwin & Sherwin,
Attorneys for Defendant,
209 South La Salle St.,
Chicago, Illinois,
Telephone Central 2010.

75 And afterwards on, to wit, the 9th day of December, 1946, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice in words and figures following, to wit:

76 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

NOTICE.

To: Sherwin & Sherwin, attorneys for defendant, 209 S. La Salle St., Chicago.

You Will Please Take Notice that on Monday, the 9th day of December, A. D. 1946, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before his Honor, Judge Elwyn R. Shaw, in the room usually occupied by him as a courtroom in the United States Court House, or before such other judge as may be sitting in his place and stead, and shall then and there move the court to overrule the defendant's motion to strike and for judgment for the plaintiff.

At which time and place you may appear if you so see fit.

Brenner & McBride,
Attorneys for plaintiff,
100 N. La Salle St.,
Chicago, Ran. 4477.

Received a copy of the above notice, this 6th day of December, A. D. 1946.

Sherwin & Sherwin.

77 And afterwards on, to wit, the 10th day of December, 1946, came the defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion and Affidavit for Continuance in words and figures following, to wit:

78 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

MOTION.

Now comes Watson Bros. Transportation Company, Inc., a Nebraska corporation, defendant herein, by Sherwin & Sherwin, its attorneys, and moves the Court to reset the above entitled cause of action from the 17th day of December, 1946 to the 23rd day of December, 1946, and in support of said motion refers the Court to the affidavit of Theodore R. Sherwin, one of the attorneys for the defendant herein, which affidavit is hereto attached;

Wherefore, defendant moves the Court to reset said cause from the 17th day of December, 1946 to the 23rd day of December, 1946.

Watson Bros. Transportation Company, Inc.
A Nebraska Corporation,
Defendant,
By Sherwin & Sherwin,
Its Attorneys,
By Theodore R. Sherwin,

December 9, 1946.

Sherwin & Sherwin,
209 South La Salle St.,
Chicago, Illinois,
Central 2010.

79 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

AFFIDAVIT FOR CONTINUANCE.

Theodore R. Sherwin, being first duly sworn on oath, deposes and says:

(1.) That he is a duly licensed practicing attorney in the City of Chicago, County of Cook and State of Illinois duly admitted to practice in the District Court of the United States for the Northern District of Illinois, Eastern Division;

(2.) That he is a member of the law firm of Sherwin & Sherwin, 209 South LaSalle Street, Chicago;

(3.) That he is in charge of the handling of the above entitled cause for the said firm;

(4.) That this affidavit is made for the purpose of resetting this cause from the date of December 17, 1946 to December 23, 1946;

(5.) That on Monday, December 9, 1946 this cause came on for hearing on the motion of the plaintiff to strike the motion of the defendant; this latter motion was directed to the pleadings of the plaintiff; that on said date said cause was not at issue; that the Court on its own motion set the said cause for hearing on December 17, 1946; that by reason of the fact that the said cause was not at issue and there was no knowledge on the part of this affiant
80 that the said cause was to be set for trial, he was not informed as to the availability of the principal and only witness in said cause;

(6.) That said witness whose testimony is material in the defense of this cause on behalf of the defendant is Mr. William M. Wolfe, Vice-President of the defendant corporation; that immediately upon leaving Court on December 9, 1946 your affiant telephoned the said William M. Wolfe and was informed that said witness, who is vice-president and house counsel for the defendant herein, would not be available to appear and testify in the said cause on December 17, 1946 by reason of the fact that he was co-counsel in a cause presently pending and set for trial on December 18, 1946 in the United States District Court for the Western District of Missouri before His Honor Judge Albert Ridge of the said Court, entitled J. Eugene Price,

et al, versus Watson Bros. Transportation Co., Inc., No. 3784; that in connection with the trial of the said cause now pending in the United States District Court for the Western District of Missouri, it is necessary that the said William M. Wolfe be present in Kansas City, Missouri on December 17, 1946 and remain in said city until the trial of the said matter is concluded, which is expected to be December 20, 1946; since said William M. Wolfe has been actively engaged in the preparation of the case and the preparation for the trial of said case; that as more particularly appears from the affidavit of Stanley Garrity, a duly licensed practicing attorney in Kansas City, Missouri, who is co-counsel in the said cause, the said case has been specially set for trial and it is impossible to secure a continuance, and it is further impossible to go to trial without the presence of said William M. Wolfe;

81 (7.) That the said William M. Wolfe is the only officer and agent of the defendant who is familiar with all of the facts and circumstances involved in the presentation of the defense of the defendant in the above entitled cause, having carried on all of the conversations and correspondence with the plaintiff herein; and having consummated the oral agreement whereby the defendant contends it is in possession of the property involved herein; that by reason of the foregoing, the testimony of said William M. Wolfe is material and necessary on the part of the defendant herein; that the place of residence of the said Wiliam M. Wolfe, is Omaha, Nebraska;

(8.) That by reason of the fact that the answer of the defendant is not due until December 13, 1946 and said cause is not actually at issue, it is not possible for the defendant to set up in this affidavit the exact and detailed testimony of said William M. Wolfe; that any affidavit setting out the matters which he would testify to if present in person, as a substitute for his personal appearance before the jury on the trial of this cause would deprive the defendant of a fair trial.

(9.) That by reason of the lack of notice that said cause would be set for trial, it not having been at issue on December 9, 1946, at the time it was set, your affiant was unable to inform the Court accurately as to whether or not he could be ready for trial and the defense of this cause;

(10.) This affidavit is made by your affiant in good faith and seeks simply a continuance of this cause for six days from December 17, to December 23, 1946.

Theodore A. Sherwin.

Subscribed and sworn to before me this 10th day of December, 1946.

Janet Brainard,
Notary Public.

(Seal)

82 And on the same day, on, to wit, the 10th day of December, 1946, there was filed in the Clerk's office of said Court a certain Affidavit of Stanley Garrity in words and figures following, to wit:

83 AFFIDAVIT.

State of Missouri }
County of Jackson } ss.

Stanley Garrity, of lawful age, being first duly sworn upon oath, states that he is a practicing attorney in Kansas City, Missouri, and a member of the firm of Caldwell, Downing, Noble & Garrity, 2000 Fidelity Building, Kansas City, Missouri; that the case of J. Eugene Price v. Watson Brothers Transportation Company, No. 3784, is pending in the United States District Court for the Western Division of the Western District of Missouri, before Albert A. Ridge, Judge; that said suit is an action for damages against the defendant in the amount of Thirty Thousand Five Hundred Dollars ($30,500.00); that the same has been pending for more than a year, and some time ago the same was set for trial December 18, 1946; that said setting is a special setting, requested by both parties because of the large number of witnesses necessary to be brought to Kansas City for trial from considerable distance; that no other cases are on the docket for that date; that William M. Wolfe, Vice President of Watson Brothers Transportation Company, has been actively engaged in the defense of the case and in preparation for trial; that arrangements have been made for the appearance of witnesses on behalf of the defendant in Kansas City on December 17th and it is necessary for Mr. Wolfe to be present in Kansas City

on said date in connection with final interview of witnesses and preparation for trial; that at the pre-trial conference the estimated length of time allowed for the trial of the case was 2½ days; that on account of special setting and the making of arrangements for the appearance of a jury on said date, it is impossible to secure a continuance, and it is further impossible to go to trial without the presence of Mr. Wolfe because of his personal knowledge of the case, the facts and his acquaintanceship with the principal witnesses for the defendant.

Further affiant saith not.

Stanley Garrity (Signed)

Subscribed and sworn to before me, a Notary Public, this 9th day of December, 1946.

(Seal) Anne Hartnett (Signed)
Notary Public.

My commission expires: June 4, 1949.

84 And on the same day, to wit, on the 10th day of December, 1946, being one of the days of the regular November, 1946, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

85 In the District Court of the United States.

* * (Caption—46-C-1886) * *

The Court being fully advised in the premises

It Is Ordered that the motion of the defendant to strike plaintiff's amended complaint be and it is hereby overruled and

It Is Further Ordered that this cause be and it is hereby set for trial on December 23, 1946.

86 And afterwards on, to wit, the 17th day of December, 1946, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice in words and figures following, to wit:

87 District Court of the United States.
* * (Caption—46-C-1886) * *

NOTICE.

To: Sherwin & Sherwin, 209 S. La Salle St., Chicago, Illinois.

You Will Please Take Notice that on Tuesday, the 17th day of December, A. D. 1946, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before his Honor, Judge Elwyn R. Shaw, in the room usually occupied by him as a courtroom in the United States Court House, or before such other judge as may be sitting in his place and stead, and shall then and there move the court (1) to take the default of the defendant for failure to file his answer to the amended complaint and for judgment in favor of the plaintiff upon the pleadings; (2) for discovery of certain documents, papers and letters under Rule 34 of Rules of Civil Procedure, in accordance with the written motion, supported by affidavit, copies of which are herewith served upon you.

At Which Time and Place you may appear if you so see fit.

Brenner & McBride,
Brenner & McBride,
Attorneys for Plaintiff,
100 N. La Salle St., Ran. 4477.

Received a copy of the above notice, together with copies of motion and affidavit in support thereof, this 16th day of December, A. D. 1946.

Sherwin & Sherwin.

88 And on the same day, on, to wit, the 17th day of December, 1946, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to Produce and Affidavit of Thomas G. McBride in words and figures following, to wit:

89 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

MOTION TO PRODUCE.

Now comes the plaintiff by Brenner & McBride, its attorneys, and moves the court for an order upon the defendant within a short day to produce and permit the inspection, copying and photographing of certain documents in the possession, custody and control of the defendant, containing evidence material to the action herein, described in the affidavit attached hereto, in accordance with Rule 34 of the Rules of Civil Procedure.

Brenner & McBride,
Attorneys for Plaintiff.

Brenner & McBride,
Attorneys for Plaintiff,
100 N. La Salle Street,
Randolph 4477.

90 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

AFFIDAVIT.

Thomas G. McBride, being first duly sworn, on oath deposes and says that he is one of the attorneys for Central States Cooperatives, Inc., plaintiff in the above entitled cause, and makes this affidavit in support of the plaintiff's motion for discovery under rule 34 of the Rules of Civil Procedure.

Affiant further says that there are in the possession, custody and control of the defendant or its attorneys, certain documents, papers and letters, which constitute and

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contain evidence material to the merits of the above entitled cause, as follows:

1. Letter of May 28, 1946 of Samuel W. Witwer, Jr. of Gallagher, Rinaker, Wilkinson & Hall, to Mr. Fay Watson, President, Watson Bros. Transportation Co. Inc. giving notice of the real estate contract between Charles H. Morse, Jr. and Central States Cooperatives, Inc., with conformed copy of contract enclosed, and with envelope in which the same was mailed;

2. Letter dated June 10, 1946 of Samuel W. Witwer, Jr. of Gallagher, Rinaker, Wilkinson & Hall, to Watson Bros. Transportation Co. Inc., being a notice of termination of tenancy effective September 30, 1946, with envelope in which the same was mailed;

3. Letter of June 7, 1946 from Thomas G. McBride to Watson Bros. Transportation Co., Inc., being an offer of a lease from Central States Cooperatives, Inc. to Watson Bros. Transportation Co., Inc.;

4. Letter dated June 17, 1946 from Edw. L. Richter of Seay & Thomas, to Mr. William Wolfe, Watson Bros. Transportation Co., Inc., relating to the offer of Central States Cooperatives, Inc. of a lease, with envelope in which the same was mailed;

5. Letter of June 25, 1946 from Thomas G. Mc-
91 Bride to Watson Bros. Transportation Co., Inc., inquiring about proposal as to lease, with envelope in which the same was mailed;

6. Letter of July 29, 1946 from Thomas G. McBride to Watson Bros. Transportation Co., Inc. inquiring about proposal as to lease, with envelope in which the same was mailed;

7. Unexecuted form of lease from Central States Cooperatives, Inc. to Watson Bros. Transportation Co., Inc., delivered to the defendant on June 7, 1946.

Thomas G. McBride.

Subscribed and sworn to before me this 17th day of December, A. D. 1946.

Colette Diver,
Notary Public.

(Seal)

92 And on the same day, to wit, on the 17th day of December, 1946, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

93 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

ORDER.

On motion of Brenner & McBride, attorneys for Central States Cooperatives, Inc., plaintiff, on due notice and motion supported by affidavit and upon good cause being shown to this court, the court being advised in the premises, it is hereby

Ordered that the defendant, Watson Bros. Transportation Co., Inc., and its attorneys shall, on or before December 19, 1946, at the hour of 3:00 o'clock P. M. at the office of the plaintiff's attorneys, produce and permit the inspection, copying and photographing by Central States Cooperatives, Inc., plaintiff or its attorneys of record, of the documents, papers and letters described in the affidavit filed herein.

Enter:

Shaw,
Judge.

Chicago, Illinois December 17, 1946.

94 And on the same day on, to wit, the 17th day of December, 1946 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer to Amended Complaint in words and figures following, to wit:

95 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

ANSWER TO AMENDED COMPLAINT.

Now comes Watson Bros. Transportation Company, Inc., a corporation, defendant herein, by its attorneys, Sherwin & Sherwin, in answer to the plaintiff's amended complaint filed herein, and alleges as follows:

1. Defendant admits the allegations contained in paragraph one of the said complaint;
2. Defendant admits the allegations contained in paragraph two of the said complaint;
3. Defendant admits the allegations contained in paragraph three of the said complaint;
4. Defendant admits the allegations contained in paragraph four of the said complaint;
5. The allegations contained in paragraph five constitute the pleading of an evidenciary matter not pertinent to the issues herein, and improper in the pleading, and should be stricken from said pleading, and, therefore, does not require answer on the part of this defendant;

96 6. Defendant admits the allegations contained in paragraph six of the complaint;

7. Defendant admits the allegations contained in paragraph seven of said complaint;
8. The defendant admits that the lease dated July 31st, 1945 between Charles A. Morse, Jr., as Lessor and Watson Bros. Transportation Company, Inc., as Lessee, expired.
9. Defendant admits the receipt of the letter described in paragraph nine of the said complaint; that the terms of said letter speak for themselves and the remaining allegations contained in said paragraph characterizing the said letter are improper, immaterial, and constitute the pleading of evidenciary matter and therefore should be stricken.

Further answering the said paragraph, the entire allegations contained in said paragraph nine constitute the pleading of purely evidenciary matters and are unnecessary in the plaintiff's prayer for relief.

10. Defendant admits the receipt of the letter described in paragraph ten of said complaint;

Further answering the said paragraph, the entire allegation contained in said paragraph ten constitutes the pleading of purely evidenciary matters and are unnecessary in plaintiff's prayer for relief.

11. Defendant admits the receipt of the letter described in paragraph eleven of said complaint;

Further answering said paragraph, the entire allegation contained in the said paragraph eleven constitutes the pleading of purely evidenciary matters and are unnecessary in plaintiff's prayer for relief.

97 12. The defendant denies the allegations contained in paragraph twelve of the said complaint.

Further answering said paragraph twelve, defendant alleges that it is lawfully in possession of the premises described in the said complaint by reason of the fact that it entered into an oral agreement with the plaintiff through its proper officers and agents; and has performed all the terms and conditions of the agreement; that this defendant has been in possession of the premises under a lease dated July 31, 1945 by and between Charles H. Morris, Jr., and Watson Bros. Transportation Co., Inc., as Lessee, which lease is referred to in the plaintiff's said amended complaint;

That the said lease gave an option on the part of defendant to purchase said property prior to the right of any other party to purchase during the term of the said lease; that prior to the expiration date of said lease, the plaintiff made an offer for the purchase of the said property, which is more particularly described in the said lease, and the defendant, through its proper officers and agents, communicated with the plaintiff and advised the plaintiff that unless on arrangement could be worked out whereby the defendant could remain in possession of the premises for the nine month period commencing October 1, 1946, to June 30, 1947, the defendant would exercise the option to purchase provided for in the said lease;

That thereafter the plaintiff, through its proper officers and agents, entered into an oral agreement with the

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defendant whereby it was agreed that in consideration of the agreement of the defendant to refrain from exercising its option to purchase the plaintiff would permit the defendant to remain in possession of the premises for the nine month period from October 1, 1946, to June 30, 1947; that the monthly rental for such possession was to be the sum of Eight Hundred Fifty Dollars ($850.00); that by
98 reason of the said agreement, this defendant did refrain from exercising its right to purchase the premises and has remained in possession of the said premises and the plaintiff did purchase and acquire title to the premises;

That this defendant has performed all the terms and conditions required by it to be performed under the said oral agreement with the plaintiff; and has tendered rent due under the said oral agreement to the plaintiff, and is thereby lawfully in possession of the said premises;

13. Defendant denies the allegations contained in paragraph thirteen of the said complaint.

Further answering the said paragraph thirteen, the defendant herein incorporates by reference, as though fully set forth herein the affirmative allegations contained in paragraph twelve of this answer.

14. Defendant denies the allegations contained in paragraph fourteen of the said complaint.

Further answering the said paragraph fourteen, the defendant herein incorporates by reference as though fully set forth herein, the affirmative allegations contained in paragraph twelve of the answer.

Wherefore, defendant prays that the complaint filed herein by the plaintiff, be dismissed and that judgment be entered in favor of the defendant.

Watson Bros. Transportation Company, Inc.,
a Nebraska Corporation,
Defendant.

By Sherwin & Sherwin,
Its Attorneys.

By Theodore R. Sherwin.

Sherwin & Sherwin.
Attorneys for Defendant,
209 South LaSalle St.,
Chicago, Illinois.
Telephone: Central 2010.

99 And afterwards on, to wit, the 16th day of January, 1947 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings of the Pre-Trial Conference December 18, 1946 in words and figures following, to wit:

101 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

Transcript of proceedings had at the pretrial conference in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his chambers, United States Court House, Chicago, Illinois, on December 18, 1946.

Present:

Messrs. Brenner & McBride, by Mr. Thomas Garth McBride, appeared on behalf of plaintiff.

Messrs. Sherwin & Sherwin, by Mr. Theodore R. Sherwin, appeared on behalf of defendant.

Reported by Edward Newlander, Official Court Reporter.

102 By the Clerk: No. 46 C 1886, Central States Co-operatives *vs.* Watson Bros. Transportation Company, Pretrial conference.

Mr. McBride: I just this very moment received counsel's copy of the Answer. I have not had an opportunity to examine the answer which he has filed.

The Court: There is an answer in the files.

Mr. Sherwin: This is an answer to the amended complaint, your Honor. There was no order on me to file—

The Court: Where is my copy?

Mr. Sherwin: I filed it, as required by your Honor, yesterday.

The Court: Let me look at your copy. Have you got an extra copy?

Mr. McBride: I have not even had a chance to read it, but your Honor is welcome to it.

Mr. Sherwin: My clerk has gone to get it. I had an envelope addressed to Mr. McBride which I do not find in my file.

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In my answer I admitted practically everything, putting in issue our contention that we are properly in possession.

The Court: That is a conclusion. That is not a fact. You are relying upon an oral lease, as I understand it.

Mr. Sherwin: That is right.

103 The Court: What do you say about that?

Mr. Sherwin: That is contained in Paragraph 12 of my answer.

The Court: Admitting the receipt of various letters.

Mr. Sherwin: Yes. I have done that so as not to have problems about them.

The Court: Let us take this and put it in the record alongside of the amended complaint then.

The defendant admits the allegations of Paragraph 1 of the amended complaint which, in substance, alleges that the plaintiff is the owner in fee simple of the premises in question, and that he got title thereto from Charles H. Morse and Vesta Morse, his wife, by a deed dated June 25, 1946 and recorded July 8, 1940, it says here. It cannot be. It is a typographical error.

Mr. McBride: That is 1946.

The Court: It should be corrected to 1946.

Mr. McBride: May I amend it on its face?

The Court: Yes, you may amend it on its face. Defendant admits the allegations of Paragraph 2, which sets forth the making of the lease between Charles H. Morse, Jr. and the defendant for the term of one year commencing October 1, 1945 and ending September 30, 1946, to be used for certain purposes, and setting forth specific provisions of that lease in quotations.

104 Defendant admits the allegations of Paragraph 4, which alleges that the lessor in that lease, Charles H. Morse, Jr., on May 27, 1946, elected to sell the premises to the plaintiff for $100,000 cash, and gave notice to the defendant as lessee of the intention to sell, as required by the lease.

Mr. Sherwin: 5, your Honor—

The Court: Wait a minute.

Mr. Sherwin: Pardon me.

The Court: Paragraph 4, which is admitted, is as follows:

"(4) That Charles H. Morse, Jr., the said lessor, did elect on May 27, 1946, to sell the demised premises to Central States Cooperatives, Inc., for the sum of $100,000

cash and on May 28, 1946 gave notice in writing to the defendant as lessee of such intention and of all of the terms and conditions of such proposed sale and gave to the said lessee the right of first refusal and the first opportunity to purchase the premises upon the same terms and conditions; that the defendant, as lessee, did not within ten days of the receipt of such notice, or at any time, notify said Charles H. Morse, Jr., as lessor of any election to purchase the premises upon like terms and
105 conditions and for like consideration, or otherwise;"—

And then follows the allegation of a conclusion.

Mr. Sherwin: I have not been trying to be picayunish.

The Court: There is no reason why you should be, because no pleadings are required in this case.

Mr. Sherwin: That is what your Honor told us the other day.

The Court: The further allegation is a conclusion: "that thereby the said Charles H. Morse, Jr., as lessor was free to sell the said premises and to sell the said premises to the Central States Cooperatives, Inc., plaintiff herein, upon the same terms and conditions set forth in the above-mentioned notice."

That is a conclusion of the pleader and not an allegation of fact. But the allegations of fact in that paragraph are admitted. Paragraph 5 of the amended complaint alleges:

"(5) That on June 10, 1946, after the expiration of the ten-day period"—that means ten days from the giving of the notice provided in Paragraph 4—"after the expiration of the ten-day period of the said lessee's right of first refusal, Charles H. Morse, Jr., the said lessor did
106 give written notice to the defendant as lessee of his intention to terminate and cancel the lease, effective September 30, 1946, more than ninety days from the date of the said notice of termination."

I don't know what that means. It was more than ninety days prior to the provision in the lease giving an option to give notice of termination—

Mr. McBride: That is what I mean, your Honor.

The Court: Then it quotes a provision of the lease giving an option to the lessee to renew the lease on sixty days notice prior to the termination date. As to that, the answer says—

Mr. Sherwin: If I might interrupt for a moment, the

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paragraph quoting the lease is Paragraph 6. In my answer I have admitted 6, your Honor.

The Court: Yes, that is right. 6 comes afterward.

As to Paragraph 5, the answer says:

"5. The allegations contained in Paragraph 5 constitute the pleading of an evidentiary matter not pertinent to the issues herein, and improper in the pleading, and should be stricken from said pleading, and, therefore, does not require answer on the part of this defendant."

That is not true.

107 Mr. Sherwin: We have no quarrel that the lease expired—

The Court: You have to either admit or deny the allegation in Paragraph 5, that is, that on June 10, 1946 Charles H. Morse gave written notice to your client of his intention to terminate and cancel the lease. That is an allegation of fact that must either be admitted or denied. The rest is a conclusion of the pleader.

Mr. Sherwin: I have my client's file and I do not have the notice in there. Therefore, in signing the pleading I cannot admit it or deny it.

The Court: It is a material fact and is definitely alleged.

Was that alleged in the original complaint?

Mr. Sherwin: No.

Mr. McBride: No, it was not, because the original complaint was a short form of complaint. After the matter came down here we became subject to the rules of the District Court.

The Court: I am not so sure of that. I am not so sure of that. I have talked to some of the other judges on that and they confirm my impression that when the case is transferred from the Municipal Court over here the rules of the Municipal Court as to original pleadings come with it.

108 Mr. McBride: May I refer to one of the rules?

The Court: Yes, if you will, please.

Mr. McBride: Rule 81(c) of the Rules of Civil Procedure:

"Removed actions. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not an-

swered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within five days after the filing of the transcript of the record in the District Court of the United States, whichever period is longer. * * *"

I had—

The Court: Over in the Municipal Court nothing was required of you but a statement of claim.

Mr. McBride: That is correct.

The Court: No formal pleading was required. Both of you, even in the Municipal Court, went beyond the requirements of the rules. Perhaps not the plaintiff in his original pleading, but the defendant in his motion to transfer filed a document which amounted to a pleading,
109 and that probably provoked the filing of an amended complaint over here which contains a lot of allegations of conclusions of the pleader, and a lot of pleading of evidence, all of which I have disregarded as surplusage. But it does contain a lot of allegations of essential facts, and this is one of them. Counsel must assume the burden of admitting or denying that allegation because it is material and pertinent.

Mr. Sherwin: I am in a position where I can neither admit nor deny. As far as—

The Court: Your client knows those facts and has always known them. If your client has not taken the trouble to inform you—

Mr. Sherwin: I have had him give me the whole file and I have discussed it with him. He has taken this answer back. He was in town—

The Court: When?

Mr. Sherwin: One day, on the way from Detroit—

The Court: When was he in town?

Mr. McBride: Friday.

Mr. Sherwin: Friday, and we spent the whole afternoon in conference, and I didn't see him—we broke up at about six o'clock. I gave him the answer. I was not required to file an answer until yesterday, when counsel came in—

110 The Court: You were required to file an answer and you were required to know that material fact from the files of your client.

Mr. Sherwin: I do not find it in the files.

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The Court: How did you prepare this?

Mr. Sherwin: I had material that permitted me to answer every other allegation.

The Court: How did you write Paragraph 5, saying that the allegations contained in Paragraph 5 constitute the pleading of an evidentiary matter and not pertinent to the issues?

Mr. Sherwin: For this reason: We admitted the lease expired on September 30th. I didn't know how material that was to the issue of the service of notice of intention to terminate.

The Court: Wasn't that required by the lease?

Mr. McBride: Yes.

Mr. Sherwin: Only in the event of sale.

The Court: This was a sale.

Mr. Sherwin: But the lease by its terms expired without notice.

The Court: No. It also had a provision that you had a right to renew if you were not notified of the intention to terminate in the event of sale.

Mr. Sherwin: I admit we have not renewed it un-
111 der the lease.

The Court: Your Paragraph 5 of the answer is insufficient and for the purposes of this pretrial conference I will consider it as an admission of the allegation of fact in Paragraph 5.

Mr. Sherwin: All right.

The Court: You have had ample time to deny it if it was not a fact. Your client was here and it is your duty to learn the material facts.

For the purpose of this conference I will treat the allegation of Paragraph 5 as admitted and your answer to paragraph 5 as insufficient.

Mr. Sherwin: I might inform the court I have had this case for some time, and as far as the pretrial conference is concerned, I was in between two other engagements yesterday, and I had a matter held to two o'clock to get here today, and I got back and prepared my answer.

The Court: I am talking now only about the answer to Paragraph 5.

Mr. Sherwin: I understand that. I wanted the court to know that.

The Court: You have had ample opportunity to determine whether or not the—

Mr. Sherwin: I do not have—

The Court: You have had ample opportunity to determine whether the lessor on June 10th gave your client
112 written notice of its intention to terminate the lease. That is within the terms of the lease, and it is a material fact, and the amended complaint was filed on November 25th, and it is now December 18th. The telephone lines are open between here and Omaha, the mails are open, and you have had ample opportunity to answer that. Your answer is insufficient and for the purpose of this hearing I consider it admitted.

Mr. Sherwin: I filed a motion directed to the answer and the court overruled that, and at the same time stated many allegations contained therein were immaterial. I am not quarreling with the court—

The Court: I told you that and I still tell you that and I am telling you that I am disregarding the immaterial allegations, but that allegation is material and is under the exact provisions of the terms of the lease and should have been so recognized by you as attorney for the defendant and by Mr. Wolf that you talk about and by everybody else. So I am taking it for granted—

Mr. Sherwin: I admit in Paragraph 8 of the complaint, not to be hopping around, that the lease expired. That is why I felt that this was not important.

The Court: You admit it expired, and at the same time say it was extended by oral agreement. Which is the fact?

Mr. Sherwin: The written lease expired.

113 The Court: This point is considered as admitted.

Mr. Sherwin: All right.

The Court: And it will be so considered on the trial of this case, in the absence of some good showing to the contrary.

Paragraph 6 of the complaint merely contains an allegation of the provisions of the lease, which is one of those immaterial things in pleading evidence. The lease speaks for itself.

Paragraph 7 of the complaint says:

"(7) That the said defendants, as lessees, did not exercise such option of renewing the said lease by giving notice in writing to the lessor by registered mail at least sixty days prior to the expiration of the said term, or in any other manner."

As to Paragraph 7, that is admitted.

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Paragraph 8 of the complaint says:

"(8) That by reason of the above facts the lease of the defendant in and to the above-described premises expired on September 30, 1946."

As to Paragraph 8, the defendant admits that the lease dated July 31, 1945, between Charles H. Morse, Jr., as lessor, and Watson Bros. Transportation Company, Inc., as lessee, expired.

114 The allegation of the complaint is that it expired September 30, 1946. So I assume that is intended as an admission that it did expire September 30, 1946.

Mr. Sherwin: Yes, that is correct.

The Court: All right.

Paragraph 9 of the amended complaint says:

"(9) That on June 7, 1946 the plaintiff herein made an offer in writing to make a lease to the defendant," which is set forth fully in the complaint in the form of a letter which it says was transmitted to Watson Bros. Transportation Company at 3201 South Iron Street, which is the place provided by the lease for the delivery of written notices.

As to Paragraph 9:

"9. Defendant admits the receipt of the letter," which is the only important admission and the only important fact.

The defendant says that the allegations characterizing the said letter are improper, immaterial, which they are and which will be disregarded.

Defendant further says that the entire allegations contained in that Paragraph constitute the pleading of purely evidentiary matters and are unnecessary to plaintiff's prayer for relief.

As to that, I am in agreement with defendant except 115 as to the fact that the letter as written was mailed in accordance with the terms of the lease to the address provided in the lease and the admission that it was received. The rest of it is pleading evidence and conclusions.

As to Paragraph 10, there is an allegation of a further letter on June 25th, sent to the defendants at their proper address. No, at the address of their home office, 802 South 14th Street, Omaha, Nebraska, which letter again refers to the making of a new lease and that they had not received any response to their letter of June 17th requesting answer if they are interested.

The allegations of Paragraph 10 are admitted except in so far as they are evidentiary matters and allegations of conclusions.

The fact admitted is that the letter stated in the complaint was mailed on June 25th, 1946 and that it was received by the defendant. The contents of the letter constitute evidentiary matter, but some of those contents are pertinent to the decision of the case.

As to Paragraph 11, another letter is set forth, a letter of July 29, 1946, addressed to Watson Bros. Transportation Company, 802 South 14th Street, Omaha Nebraska, which letter to the Watson Bros. Transportation Company stated
that on June 29th, following the letter of June 25th,
116 the writer, one Thomas G. McBride, had a telephone
conversation with Mr. Wolf, who I have been given to understand is a vice-president of the defendant company and its attorney—is that right?

Mr. Sherwin: That is correct.

Mr. McBride: That is right.

The Court: Relative to the possible making of a new lease from the Central States Cooperatives to the Watson Bros. Transportation Company for the dock space, but at conclusion of this conversation Mr. Wolf stated he would talk to Mr. Watson and would let him know in a few days what they wanted to do. The letter says further:

"Thirty days have elapsed from this time without any communication from you by letter or otherwise. Central States Cooperatives has naturally assumed that you are not interested in remaining in the premises after September 30, 1946.

"This being the case, we are in the course of making a lease with other prospective tenants for the occupancy of the dock space, beginning October 1, 1946. Since your present lease terminates September 30th we will expect you to vacate the premises on that date in order that Central States Cooperatives, Inc. may take possession of
the same on October 1, 1946 and in order that the
117 tenant of Central States Cooperatives may occupy the
dock space on said property beginning October 1, 1946.

"This letter is written for the purpose of avoiding any possible misunderstanding with regard to the above premises."

And then the complaint says that no response was made by letter or otherwise by the defendant to said letter.

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Now, as to the answer, it admits the receipt of that letter, but does not answer the concluding allegation that no response was made by letter or otherwise by the defendant to said letter. No answer to that allegation is made and it therefore will be considered as admitted, with the rest of the paragraph.

As to Paragraph 12—let me read this over—the defendant denies the allegations contained in Paragraph 12.

Paragraph 12 is mostly immaterial, except that part of it which says:

"no other offer was made by the plaintiff to the defendant orally or in writing for the lease of the said premises or any part thereof for any term of years or months or otherwise, and no agreement of lease orally or in writing was made at any time between the plaintiff and the de-
118 fendant relating to the leasing by the plaintiff to the defendant of the said premises or any portion thereof for any term of years or months or otherwise."

Paragraph 12 is immaterial and will be disregarded, except that part which says that no other offer was made by the plaintiff to the defendant orally or in writing for the lease of the said premises or any part thereof for any term of years or months or otherwise. The rest of it is either immaterial or anticipating a defense and not proper pleading on the part of the plaintiff.

As to the defendant's answer to that:

"defendant alleges that it is lawfully in possession of the premises described in the said complaint by reason of the fact that it entered into an oral agreement with the plaintiff through its proper officers and agents; and has performed all the terms and conditions of the agreement; that this defendant has been in possession of the premises under a lease dated July 31, 1945 by and between Charles H. Morse, Jr., and Watson Bros. Transportation Company, Inc., as lessee, which lease is referred to in the plaintiff's said amended complaint;
119 "That the said lease gave an option on the part of defendant to purchase said property prior to the right of any other party to purchase during the term of the said lease; that prior to the expiration date of said lease, the plaintiff made an offer"—

Mr. McBride: Referring to my client.

The Court: Yes. It is immaterial. It is just repeating the terms of the lease.

Mr. Sherwin: I am setting up our—

The Court: We will get down to the point where you say "thereafter" without giving any date. It says this much that is material:

"The defendant, through its proper officers and agents, communicated with the plaintiff and advised the plaintiff that unless an arrangement could be worked out whereby the defendant could remain in possession of the premises for the nine months period commencing October 1, 1946, to June 30, 1947, the defendant would exercise the option to purchase provided for in the said lease;

"That thereafter the plaintiff, through its proper officers and agents, entered into an oral agreement with the defendant whereby it was agreed that in consideration
120 of the agreement of the defendant to refrain from exercising its option to purchase the plaintiff would permit defendant to remain in possession of the premises for the nine months period from October 1, 1946, to June 30, 1947; that the monthly rental for such possession was to be the sum of $850.00; that by reason of the said agreement, this defendant did refrain from exercising its right to purchase the premises and has remained in possession of the said premises and the plaintiff did purchase and acquire title to the premises;

"That this defendant has performed all the terms and conditions required by it to be performed under the said oral agreement with the plaintiff, and has tendered the rent due under the said oral agreement," and so forth.

Right there is the substance of your whole lawsuit.

Mr. McBride: That is correct.

The Court: There is nothing else that is of any importance.

Gentlemen, as I analyze the pleadings in this case, there is absolutely nothing here but a claim of an oral lease made by somebody to somebody to stay in possession of those premises from the 1st of October until the 1st of the
121 following July. That is all there is in it, isn't that right?

Mr. Sherwin: That is right, Judge.

The Court: All right.

What are you going to do about the statute of frauds?

Mr. Sherwin: It is a lease for a term less than a year.

The Court: No. It is not a lease for a term less than

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a year. It is an agreement not to be performed within a year.

Mr. Sherwin: We have performed all the terms—

The Court: The agreement cannot be performed within a year.

Mr. Sherwin: I am saying we performed the terms of our agreement, all that has to be done on our part. It is fully performed as far as we are concerned. The agreement to refrain from exercising the option—

The Court: It could not be fully performed because the term has not yet expired.

Mr. Sherwin: I am not saying the term of the lease, but the agreement on refraining to exercise the option.

The Court: If you have an agreement you have to have one that was made within the period of your option. That is the only agreement that could be supported by any consideration.

122 Mr. Sherwin: That is right.

The Court: There is no doubt about that. And that term—

Mr. Sherwin: It was June 6th.

The Court: You had an option to buy the premises between—

Mr. McBride: The 28th of May—

The Court: The 28th of May and ten days later.

Mr. Sherwin: It was June 6th.

The Court: June 6th, and if you made any oral agreement for a new term you had to make it between those dates. Otherwise it would be without consideration, and you allege in your pleading you did make it within those dates. In other words, you alleged that prior to the 6th of June you made a contract which could not be performed until the 30th of June following.

Mr. McBride: That is right.

The Court: You are squarely within the statute of frauds, on your own admissions.

Mr. Sherwin: There is no quarrel about our admissions. I do not feel we are in the statute.

The Court: That is a question of law, isn't it?

Mr. Sherwin: Yes.

The Court: It does not require any jury to determine that question.

123 Mr. Sherwin: On the question of whether we had fully performed our terms, I don't think it is a question of law.

The Court: Maybe you don't understand the statute of frauds.

Mr. Sherwin: That is the way I understand it.

The Court: A lease for less than a year can be made under the statute of frauds if it is to be performed within a year. But you are making an oral agreement not to be performed within a year. On the face of your pleadings you are out of court.

Mr. Sherwin: My point was, your Honor—

Mr. McBride: That was the next question I intended to raise.

The Court: I went through the pleadings yesterday and I went through the case thoroughly, and I think I know what I am talking about. Maybe I am wrong. But it is true, an oral lease can be made for a term of less than a year, there is no doubt about that.

Mr. Sherwin: I am not going off on that point. I mentioned that point to your Honor. I am saying that under our contract with them we refrained from exercising the option. In consideration of this oral agreement—

The Court: That would be a valid consideration for a contract that would be valid, and that is the only ques-
124 tion there is in this pleading. You refrained from exercising an option, and that had to be done necessarily, and you alleged it in your pleadings, prior to the 6th of June, 1946.

Mr. Sherwin: I allege in my original answer June 6th—

The Court: That is all right. That is the date it had to be, because if you alleged any other date it would be void of consideration. You allege in substance, as a defense to this suit and your only defense to this suit, that on the 6th of June, 1945 you made an oral lease which would expire on June 30, 1946.

Mr. McBride: 1947.

The Court: Or 1947.

Mr. McBride: Yes.

The Court: You have a question of law there.

I will be glad to hear your authorities on it. I took a brief look at it yesterday on my own account in getting ready for this conference.

Mr. Sherwin: May I present authorities Monday morning?

The Court: We have this case set for trial Monday morning.

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Mr. Sherwin: Yes. If I can convince your Honor that there is a question of fact at that time—

The Court: How can there be a question of fact?

Mr. Sherwin: I mean on the question of law, that
125 we have an agreement that we fully performed and that therefore the statute does not apply.

The Court: How do you mean, you fully performed? You performed up to date, but you cannot possibly have fully performed up to the 1st of next July.

Mr. Sherwin: It is my position that our full performance was the refraining from exercising the option whereby they were permitted to acquire the premises. We have done everything on our part, as a part of that agreement, and I would like to present some authorities on that.

The Court: Up to the present time you have no question for a jury. If you have any authorities that will let you out of the statute of frauds—

Mr. Sherwin: That is the only authority.

The Court: Then there is another question in this case that the plaintiff has overlooked. It can be cured by amendment, and I will expect it to be cured by Monday morning if this case goes to trial Monday morning. Under the authorities, if the plaintiff has made a new lease to somebody else that person should be a plaintiff in this case. That is the person that is entitled to possession.

Mr. Sherwin: This is a possessory action.

The Court: Yes. I don't know whether they have made a new lease.

126 Mr. McBride: We have not.

The Court: You have not raised that question. I don't know whether it is a fact or not.

Mr. McBride: At that time we were contemplating so doing.

The Court: I have seen these cases blow up where that has happened.

Mr. McBride: No, no new lease has been made to anyone else.

The Court: Then, if no new lease has been made, either oral or written, if your client is entitled to possession, all right. It looked on the face of the cards that possibly you made a new lease to somebody else. I don't want you to fall into that trap.

Mr. Sherwin: I was not raising any such point.

The Court: Because I did not know but what you might have had it up your sleeve.

Mr. Sherwin: It is a good point. I will inquire right now—

The Court: It would be perfectly legitimate if you would have it up your sleeve, but I do not like cases in my court to go up that way.

Mr. Sherwin: I wouldn't do that.

The Court: If I were practising law now and the other fellow left a hole in his case, I would step into it.

127 Mr. Sherwin: I always like to advise the other lawyer so that on the trial of the case when his client is here he does not—

The Court: I always practised law on the theory the other lawyer can take care of himself. But as a judge I take a different position.

Mr. Sherwin: You have made a good point. We had determined that they had not—

The Court: I am merely calling it to the attention of exerybody so that all the cards may be on the table face up and so that we may get this case disposed of on the merits at the earliest possible moment.

Mr. Sherwin: I appreciate that.

The Court: If you have some way out of the statute of frauds, I would like to see your authorities. You are a good lawyer—

Mr. Sherwin: I would like an opportunity—

The Court: There are a lot of books back of you. Haven't you briefed—

Mr. Sherwin: I have examined into it.

The Court: It is not difficult to get me the law on it.

Mr. Sherwin: I appreciate the compliment. I cannot go to the digest and find it at this moment. I am only asking to present it Monday morning.

128 The Court: I'll bet I could find it in twenty minutes.

Mr. Sherwin: I'll bet your Honor could.

The Court: I'll bet you have something on it in your file.

Mr. Sherwin: No. You can look through my file.

Counsel raised the statute of frauds in the Municipal Court, and that was the end of it.

The Court: How did he raise it?

Mr. Sherwin: It was raised on a motion to strike, and it was not argued.

The Court: Motion to strike what?

Mr. Sherwin: Petition for removal.

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The Court: When the petition was filed the Municipal Court lost jurisdiction, and that ended that.

Mr. McBride: Yes, that is true. That disposed of that.

Mr. Sherwin: I am not looking to delay this or—

The Court: Counsel, I do not think you are, but I think your client is.

Mr. Sherwin: There is no question about that. They cannot operate out of their hat.

The Court: They are aware of the fact that double rent is accruing?

Mr. Sherwin: If it is a wilful holdover, it is double the rent.

129 The Court: Yes. They are aware of that fact, and I suppose they are willing to assume that burden to keep in business. I can see their position, and whatever decision results here, if it is adverse to your client, it will appeal?

Mr. Sherwin: That is correct.

The Court: And put up a bond and all that?

Mr. Sherwin: Yes. I am not going into any settlement discussion, but we have been trying to get together. That is what took place, and I stated a certain amount, and I thought my client should pay it, but we haven't been able to get together.

The Court: On the face of the pleadings and the admissions your client would find grave difficulty in this question of fact to go back and establish a claimed oral agreement, in the face of the letters written and admittedly received.

Mr. Sherwin: That is the case as I have it.

The Court: You see your duty and you are doing it, I suppose, but I must point out to you that on the face of this record it would take a very strong—an extremely strong bundle of proof to overcome the inferences arising from the giving and receipt of these letters.

Mr. Sherwin: I have told exactly that to Mr. McBride, that the record he made is good, and my client's rec-

130 ord is bad.

The Court: You don't say who made the oral agreement.

Mr. Sherwin: Wolf had the discussions with McBride, and that is who the letters are addressed to.

The Court: But you recognize the fact that many of those letters are long subsequent to the date you have to rely on.

Mr. Sherwin: I can just point out this to your Honor, that in Municipal Court cases, in forcible entry cases, where we contend we had a year-to-year lease or a hold-over, and defendant gets a 30-day notice and the other side doesn't get right into court but waits, they do not accept the rent and then they come in and say, "Why didn't you answer the notice?"

Our position is that we are in possession under a hold-over.

The Court: That is an entirely different situation. But they set forth here a letter of June 7th which is later than your date, requesting the making of a new lease, and you admit that letter was received and not answered. There is another letter of June 25th, enclosing a proposed draft of a new lease and requesting Mr. Wolf to make a response if they are interested, asking them to act promptly, and admittedly there is no response to that letter which was admittedly received.

131 There is another letter on June 29th definitely closing the matter unless some further response is received.

If Mr. Wolf had an oral lease all that time there is such a strong presumption that he would have answered those letters and made his claim, that it will be very difficult to overcome.

Mr. Sherwin: I concede that. I think his conduct here, especially when he is an attorney—

The Court: He will be here Monday morning ready to testify?

Mr. Sherwin: He will be.

The Court: I assume whoever you have will be ready to testify.

Mr. McBride: Yes, he will be here.

The Court: I am indicating the limits of the issues.

Mr. McBride: I would like to make reference to this point, that it appears to me from the pleadings, the form they have taken, the burden of proof is on the defendant to establish his affirmative defense.

The Court: Undoubtedly.

Mr. Sherwin: We will have to go ahead.

The Court: Undoubtedly you are committed to an affirmative defense and the burden will be on you to establish it. That is the way the record stands at the present

132 time.

Mr. McBride: Under the rules of court no further pleadings, other than the complaint and answer are required. There is nothing concerning a reply.

The Court: No.

Mr. McBride: And that which is stated in the answer is taken as avoided.

The Court: I think the pleadings are closed in this case. I don't see anything further.

Mr. McBride: Very well.

The Court: I assume there is a denial. In fact, you have anticipated the defense by denying any oral lease. I do not think that is necessary.

I think the pleadings are closed, and all of us understand the issues.

Mr. McBride: Very well.

Mr. Sherwin: I understand them.

The Court: That gets you down to a narrow point.

134 And afterwards, to wit, on the 18th day of December, 1946, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

135 In the District Court of the United States.

* * (Caption—46-C-1886) * *

This being the day on which this cause was set for pretrial conference come the parties to this suit by their attorneys, respectively, said conference is held and

It Is Ordered that this cause be and it is hereby continued to December 23, 1946.

136 And afterwards on, to wit, the 17th day of January, 1947, there was filed in the Clerk's office of said Court a certain Transcript of Proceedings before Hon. Elwyn R. Shaw on December 23, 1946, in words and figures following, to wit:

138 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

Transcript of proceedings had at the trial of the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his courtroom, United States Court House, Chicago, Illinois, and a jury, on December 23, 1946.

Present:

Messrs. Brenner & McBride, by Mr. Thomas Garth McBride, and Mr. Carl Brenner, appeared on behalf of plaintiff;

Messrs. Sherwin & Sherwin, by Mr. Julius L. Sherwin, and Mr. Theodore R. Sherwin, appeared on behalf of defendant.

Reported by Edward Newlander, Official Court Reporter.

140 (The following proceedings were had before the impaneling of the jury:)

Mr. McBride: The plaintiff is here.

The Court: Did you get Mr. Wolfe?

Mr. T. R. Sherwin: Yes.

The Court: Have you anything further to submit on the questions of law I raised at the pre-trial conference?

Mr. T. R. Sherwin: I have some authorities.

Mr. McBride: I am prepared to discuss it.

Mr. T. R. Sherwin: The factual aspects.

I have a number of cases which I discussed with your Honor. I mentioned full performance. That was incorrect. It is part performance of the contract, and your Honor correctly stated that is a question for the court, to determine whether the performance on the part of the person claiming an oral contract is sufficient to take it out of the statute of frauds. I have the case of Anderson *vs.* Collinson, 300 Ill. App. 22.

The Court: What other cases have you?

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Mr. T. R. Sherwin: Then I have the case of Winans *vs.* Bloomer, 321 Ill. 76. Also Gray *vs.* Schoonmaker, 119 F. (2d) 1010, which affirmed 30 F. Supp. 1019.

The Court: All right. Your contention, as I understand it, is that by refraining from exercising an option, your client fully performed a contract for a verbal lease to
141 expire more than a year later.

Mr. T. R. Sherwin: I said "fully performed" in the pre-trial conference. I say now it is a part performance, as your Honor correctly stated. Full performance would have been completion of the entire contract.

By that part performance we have placed ourselves in the position that we could not be restored to the status quo after the option period expired. By virtue of that fact the contract was partly performed and taken out of the operation of the statute of frauds.

The Court: What have you to say about that?

Mr. McBride: There is a number of principles that enter into this doctrine of part performance which must be met in order that the doctrine be applied to take the case out of the statute. I have these here, supported by the authorities, and I have a brief on the point.

The Court: Give me your principal cases and what they hold.

Mr. McBride: The first point is that the defendant has not shown any substantial change for the worse in his position in consequence of the agreement.

I have this already written for your Honor, to save your Honor the trouble of writing it down.

The Court: From where I sit I see you have cited about fifteen or twenty more cases.

142 Mr. McBride: Yes.

The Court: I do not have the time to read that many cases before the jury comes in. I do not intend to read the whole encyclopedia.

Mr. McBride: The principal cases are Holcz *vs.* Stephen, 362 Ill. 527; Barrett *vs.* Geisinger, 148 Ill. 98—

The Court: These are leading cases, are they?

Mr. McBride: Yes, they are.

The Court: All right.

Mr. McBride: Ellison *vs.* Ellison, 372 Ill. 323; also Christensen *vs.* Christensen, 265 Ill. 170.

The Court: What is that case about?

Mr. McBride: That case is to the effect that a contract

may be taken out of the statute of frauds by part performance if it would make a fraud to permit the defense to be interposed against the obligation assumed. But there are certain conditions which the courts have always insisted upon. One is that the contract in its terms be established by clear and unequivocal evidence leaving no reasonable doubt in the mind of the court; the object of the statute is to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts.

The performance relied on must place the party
143 who has performed in such a situation that it would be a fraud upon him if the agreement were not carried out. The acts of part performance must have been done under the contract itself and for the sole purpose of performing it, much refer exclusively to the contract, and must be such as cannot be explained consistently with any other contract than the one alleged and must be such as would not have been performed but for the contract.

Mr. T. R. Sherwin: I rely on those cases myself. Counsel is reading what I would have read to the court.

The Court: We will call a jury, and resume in a half hour from now.

(Intermission.)

(After the jury was duly impaneled and sworn, the following further proceedings were had:)

The Court: Make your opening statement, Mr. McBride.

Mr. McBride: If the Court please, and ladies and gentlemen of the jury, we are here this morning for the—

The Court: I am not sure but what the other side should have the opening statement. They have it.

Mr. McBride: On them is the burden of proof.

The Court: They have the affirmative defense, according to the pre-trial conference. Perhaps they would like to make the opening statement.

144 Mr. T. R. Sherwin: We will let him proceed if he wants to.

The Court: He is not called upon to make any statement in the record. The opening statement should be made by the defendant.

Mr. McBride: It is perfectly agreeable to me.

Mr. J. L. Sherwin: To save time, we will waive our opening statement.

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Mr. McBride: I should like then to make my opening statement.

The Court: In the state of the record the defendant has the affirmative.

Mr. McBride: That is correct.

The Court: It is therefore up to the defendant to proceed with its case.

Mr. McBride: That is correct. I do not wish to waive the right to state the defense upon which the plaintiff wishes to meet the affirmative defense.

The Court: According to the pre-trial conference and according to the record up to the present time, there is an affirmative defense here and the defendant is the moving party. Let the defendant proceed as it sees fit.

Mr. J. L. Sherwin: We will call Mr. Wolfe.

145 WILLIAM M. WOLFE, called as a witness on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. J. L. Sherwin.

Q. State your name, please.
A. William L. Wolfe.
Q. Where do you reside, Sir?
A. Omaha, Nebraska.
Q. Prior to residing there, where did you live?
A. I lived in Council Bluffs, Iowa, right across the river.
Q. For the record, how old are you, Mr. Wolfe?
A. Thirty-five.
Q. By whom are you employed?
A. Watson Bros. Transportation Company.
Q. And they are a Nebraska corporation, is that correct?
A. Yes, sir.
Q. In what business are they engaged, Sir, in a general way?
A. We are a motor common carrier, handling freight in interstate commerce.
Q. Covering what general areas?
146 A. Between Chicago and Denver, and Minneapolis and Kansas City.
Q. And your main offices or your general offices are where, please?

A. Omaha, Nebraska.
Q. What is your official title there, if you have a title?
A. Vice-president.
The Court: Are you also a member of the Board of Directors?
The Witness: No. The Board of Directors consists of the three Watson brothers.
The Court: You are not a member of the Board?
The Witness: No, sir.
Mr. J. L. Sherwin: Mark this, please.
(Said document was marked Defendant's Exhibit 1, for identification.)

By Mr. J. L. Sherwin:

Q. I show you Defendant's Exhibit 1 for identification, Mr. Wolfe. You have had occasion to see that many times in recent weeks and months, is that correct?
A. Yes.
Q. Does the last line bear your signature?
A. Yes, it does.
147 The Court: Show it to opposing counsel.
Mr. J. L. Sherwin: Yes, your Honor.
Any objection to it going in evidence?
Mr. McBride: No objection to its receipt in evidence.
Mr. J. L. Sherwin: We will offer it as Defendant's Exhibit 1.
The Court: The lease?
Mr. J. L. Sherwin: The lease referred to in the pleadings.
The Court: It is admitted.
(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 1.)

148 By Mr. J. L. Sherwin:

Q. This defendant's Exhibit 1, which is now in evidence, was signed on the date it bears, July 31, 1945, is that correct?
A. It is.
Q. And as a result of having entered into this lease, will you tell us where the physical premises are, referred to in the lease, in Chicago?
A. Thirty-second and Iron streets.
Q. More specifically known, I believe, as 3201 Iron Street?
A. I believe that is correct.

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Q. For the jury's enlightenment, will you give us a description of the physical premises, without getting it down to detail?

A. This is a motor truck terminal. It consists of a garage, an office and a dock, which is about the same height as this jury box.

Q. Pardon me, Mr. Wolfe. Give us some directions first please. Iron Street is a street in the city of Chicago?

A. Yes.

Q. It runs in what direction?

A. I never can get directions very straight. It is kind of on an angle.

149 The Court: Can you agree on that?

Mr. J. L. Sherwin: Mr. McBride, what direction—

The Court: The lease contains a written description. Can't you agree on that, for the record?

Mr. McBride: Iron Street runs north and south.

Mr. J. L. Sherwin: Now we can get the physical picture.

The Court: What are the dimensions of the lot in question? It is all covered by the lease, but perhaps the jury—

Mr. J. L. Sherwin: We will read the lease in the record. I wanted the jury to have a physical picture.

The Court: What are the dimensions of this lot, and where does it lie?

By Mr. J. L. Sherwin:

Q. Approximately?

A. I don't know the dimensions of the lot, but I can give the jury this picture. The dock is 200 feet long by about 30 feet wide.

Q. Extending perpendicular to Iron Street, is that correct?

A. That is correct.

The Court: Is that dock along the river?

The Witness: Yes, it is along the river there. I 150 think it is the river, or canal.

The Court: About two hundred feet from the river, and how much in the other direction?

The Witness: Then the garage also sort of goes along the river a way. The garage is about, I would say, 100 by 100 feet. It is almost square. Then there is an office that connects this dock and also connects to the garage. It sort of forms a T-shape.

The Court: Is this material to the issues in this case?

Mr. J. L. Sherwin: It is material, because we are going to talk later, if I may make this statement in the presence of the jury, about an agreement to build an addition on the part of the plaintiff, to build an addition to the garage, and for the purpose of agreeing to this oral lease, as one of the conditions of it—

The Court: That is not shown by the pleadings?

Mr. J. L. Sherwin: It is incidental to a conversation that we had. He will tell us—

The Court: Bring out the conversation; but the size and shape of the premises have nothing to do with whether or not there was an oral agreement.

Mr. J. L. Sherwin: We will get to the agreement.

The Court: Get right down to the point, Counsel.

Mr. J. L. Sherwin: All right.

151 Q. Under the terms of this lease—it will save a lot of time that would be taken in reading the lengthy lease—your lease was to expire when, Mr. Wolfe?

A. On September 30, 1946.

Q. September 30th of this year?

A. Yes, under that particular lease.

Q. And your lease was with a man named Charles H. Morse, Jr., of Libertyville, in Lake County, Illinois, is that correct?

A. Yes.

Q. In connection with this lease, did you have an option to purchase the premises?

Mr. McBride: I object to it.

The Court: The lease provides for the option to purchase, and it is in the record. It will be explained by the court or counsel.

Mr. J. L. Sherwin: May we reserve the right to read this lease at a later time?

The Court: You have that right, so far as pertinent to the issues in question. You may do so now or later, as you see fit?

Mr. J. L. Sherwin: For the record, so that it is—

The Court: There is a written lease in evidence. That lease contains certain provisions which counsel has the 152 right to read to you if he wishes.

Mr. J. L. Sherwin: We will reserve that right, your Honor. Thank you.

The Court: Maybe you had better make it clear to the jury what you are talking about at this time.

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Mr. J. L. Sherwin: All right. I will abide by your Honor's suggestion.

The Court: There is a certain expiration date in the lease. There is a certain provision as to the option to purchase, and there is a certain provision as to what must be done in the event of the option to purchase being exercised.

Suppose you give the jury those parts of the lease that are material.

Mr. J. L. Sherwin: All right. Thank you, your Honor.

(Thereupon Mr. J. L. Sherwin read from Defendant's Exhibit 1.)

153 Mr. J. L. Sherwin: Mark this Defendant's Exhibit 2 for identification.

(Said document was marked accordingly.)

By Mr. J. L. Sherwin:

Q. I hand you Defendant's Exhibit 2 for identification. When did you first see that, and where?

A. I saw that in Omaha, Nebraska a day or two later than this letter.

The Court: What is the date?

Mr. J. L. Sherwin: It is dated May 28, 1946.

Q. So you saw it about May 30, 1946, is that correct?

A. That is correct.

The Court: Show it to counsel.

Mr. J. L. Sherwin: Have you seen that before?

Mr. McBride: I have not seen that. What you have shown me was a copy of it.

Mr. J. L. Sherwin: Now you see the original. Is there any objection to that going in evidence?

Mr. McBride: Just let me take a look at it.

Mr. J. L. Sherwin: Certainly. Just take your time.

The Court: Show it to the Court please.

Mr. McBride: No objection to the introduction and receipt in evidence of that document.

The Court: Let the record show it is admitted without

154 objection.

(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 2.)

155 The Court: Is this quoted in the pleadings?

Mr. T. R. Sherwin: That is not quoted. It is mentioned.

The Court: Is this set forth in the written pleadings?

Mr. McBride: No, it is not.

The Court: Let me look at it.

Let the record show it is admitted without objection.

You saw this a couple of days after its date?

The Witness: Yes.

The Court: About June 1st?

The Witness: Yes, I think so. I think there was a holiday in there.

The Court: That would be Decoration Day.

The Witness: I think I saw it the day after Decoration Day.

The Court: That would be June 1, 1946.

The Witness: I believe that is correct, your Honor.

The Court: Was this received and read by you in your official capacity as vice-president of Watson Bros. Transportation Company?

The Witness: Yes.

The Court: Very well. Proceed.

156 Mr. J. L. Sherwin: I would like to read it in now, so that it will be in chronological order.

(Thereupon Mr. J. L. Sherwin read DEFENDANT'S EXHIBIT 2 to the jury.)

The Court: We will take a ten-minute recess at this time, ladies and gentlemen.

(Recess taken.)

By Mr. J. L. Sherwin:

Q. The letter that was just read, Defendant's Exhibit 2, you read that on May 30, 1946, is that correct?

A. Either May 30 or June 1st, I am not certain.

Q. Following that, without giving any conversations, did you confer with Mr. J. Watson, the President of Watson Bros. Transportation Company?

A. I did.

Q. And with any others?

A. I don't believe so.

Q. Following that did you have occasion in connection with this Defendant's Exhibit 2, the letter, to come to Chicago?

A. I did.

Q. When did you arrive at Chicago?

A. The morning of June 6th.

Q. Upon arriving in Chicago, did you have occasion
157 to go to the offices of the Central States Cooperatives, Inc., the plaintiff in this case?

A. I did.

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Q. 1535 South Peoria Street in Chicago, Illinois?
A. I think that is correct.
Q. Did you talk to anyone there?
A. Yes. I asked for the President first, and then I later spoke to Mr. Lehtin, and another man—I can't recall his name at the moment.
Q. Do you see Mr. Lehtin in the courtroom?
A. Yes.
Q. Will you indicate him, please?
A. The third man on the other side.
Mr. J. L. Sherwin: Indicating, for the record, Laurie L. Lehtin.
Q. Where was this conversation held?
A. It was held in Mr. Lehtin's office.
Q. One other thing first. Was it in the morning or afternoon?
A. The morning of the 6th.
Q. The morning of the 6th of June, 1946?
A. That is correct.
Q. What did you say to Lehtin and what did he say to you?
158 Mr. McBride: I wish to make an objection, if the Court please, to a conversation with Mr. Lehtin so far as it may have to do with the issues of this case, as being a conversation with someone whom they have not shown has authority to bind the corporation.
Mr. J. L. Sherwin: We will tie that up, Judge. I may mention that Mr. Lehtin will testify he is the general manager, dealing for the company, representing them, and their operating executive.
Mr. McBride: Counsel's statement does not of itself show such authority, nor do the facts which he has stated, if true, constitute an authority—
Mr. J. L. Sherwin: Let us have an understanding. Do you contend Mr. Lehtin is not an authorized official of the company?
The Court: Just a minute, gentlemen.
Mr. J. L. Sherwin: Pardon me.
The Court: These are matters that should be discussed in chambers.
The jury may be excused for a moment.
Mr. J. L. Sherwin: May I respectfully suggest, the hour being 12:15, not that we adjourn, but that the jury be excused for lunch?

The Court: I want to run until 1 o'clock and start
159 again at 2:30.

Mr. J. L. Sherwin: I want to make matters expedient.

(The following proceedings were had out of the presence and hearing of the jury:)

The Court: Let the record show the jury is withdrawn from the courtroom.

What is your objection, Counsel?

Mr. McBride: My objection is that they propose with this witness to prove, I suppose, an oral conversation with Mr. Lehtin, who is general manager of Central States Cooperatives, Inc., as the basis for their defense here. Mr. Lehtin, as general manager, has no authority to lease out the property of this corporation upon oral lease, upon the terms set up in the answer filed here. The property here consists of a piece of property purchased by the Central States Cooperatives at the price of $100,000. The use of this property which the plaintiff intended to make of it was that of operating its business. It was not engaged in the real estate business. It is engaged in the business of buying and selling groceries. The property here was purchased for the purpose of engaging in that business.

They seek to prove by this witness, I suppose, the
160 oral agreement, that in a conversation with Mr. Lehtin as general manager he leased to them the entire premises. That would be beyond his authority.

The Court: It was prior to the execution of the deed, was it not?

Mr. McBride: Yes.

Mr. T. R. Sherwin: Yes.

Mr. McBride: Prior to the time when he received title to the property.

The Court: What authority did Mr. Lehtin have to make an oral lease for the owner of the property at the time the conversation is supposed to have taken place?

Mr. McBride: None whatsoever, your Honor, not only as to his authority granted by the corporation, but as to the time—

The Court: The contract existing at the time was between Mr. Morse, as lessor, and the Watson Company. There was no title in Mr. Lehtin or in Mr. Lehtin's company at the time of this alleged conversation?

Mr. McBride: That is correct. Furthermore, at this time the contract was not a valid contract between the par-

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ties, but an offer had been made by Central States for the purpose of purchasing the property, and was conditioned upon the then tenant not exercising its option to pur-
161 chase.

The Court: If there was a contract to be made at that time for the future leasing of the premises, it would have to be with the owner, Mr. Morse, would it not?

Mr. McBride: That is correct.

The Court: What is your position on that matter?

Mr. T. R. Sherwin: The conversation was that it would become effective in the event we refrained from exercising our option, and at that time the contract would then be a binding contract and—

The Court: You claim then under a lease with Mr. Lehtin's company and not under the original lease?

Mr. T. R. Sherwin: That is right. The lease is with Central States Cooperatives, and the evidence will show Mr. McBride drafted a certain lease which was not in accordance with the oral contract, and that draft or memorandum was approved by—

The Court: Are you claiming under the original lease, an extension of the original lease, or under a totally independent lease made with the Central States?

Mr. T. R. Sherwin: The way it shaped up, it was an extension of the original lease.

The Court: I want to know what your theory is. Which way are you contending this thing went?

162 Mr. T. R. Sherwin: It is under an agreement with Central States.

The Court: You claim an oral lease with the Central States?

Mr. T. R. Sherwin: Yes, to become effective when they acquired the property.

The Court: Then you do not claim an extension of the original lease?

Mr. T. R. Sherwin: We are not claiming an extension of the original lease, though the conversation was it would be extended.

The Court: The two positions are inconsistent. You can see that, can't you?

Mr. T. R. Sherwin: Yes, on the question of whom we are dealing with.

The Court: Whom are you claiming under?

Mr. T. R. Sherwin: Central States.

The Court: Are you claiming under an oral lease?

Mr. T. R. Sherwin: Yes.

Mr. J. L. Sherwin: And the consideration for that lease is our refraining from purchasing the premises. We had a limited need for the premises, but it was so important we get it that we would have purchased it had they not given us this lease; but, having given us this lease, or at least
163 trapped us into not purchasing—that is what took place. They nudged us along until we thought we had no right—

The Court: I don't care about that. I want to know whom you claim under.

Mr. T. R. Sherwin: Central States.

The Court: Then you claim under an oral lease of June 6th?

Mr. T. R. Sherwin: June 7th, it will develop.

The Court: To expire a year and 23 days later.

Mr. T. R. Sherwin: That is correct.

The Court: You claim the consideration for that lease was your refraining from purchasing?

Mr. T. R. Sherwin: That is right.

Mr. J. L. Sherwin: And certain other considerations.

The Court: From Mr. Watson.

Mr. T. R. Sherwin: From Mr. Morse.

Mr. McBride: Let me object further, your Honor, that at the time of this supposed agreement the ten-day period had not as yet expired.

The Court: I understand. It would have to be—

Mr. T. R. Sherwin: Otherwise we would have exercised our option. Had it not expired we would have been out.

Mr. McBride: They claim that Mr. Lehtin, as gen-
164 eral manager of Central States, had authority to enter into an engagement which would bind Central States.

The Court: That is something that will have to be proved later. Counsel says he will connect it up.

Bring in the jury.

Mr. T. R. Sherwin: Your Honor might be interested in seeing a letter sent by McBride, and approved by Lehtin. There is no question that Lehtin had authority.

The Court: That comes later.

Mr. T. R. Sherwin: We will connect it up.

The Court: Counsel says he will connect it up. If he doesn't, it will be stricken.

Mr. T. R. Sherwin: All right.

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Mr. McBride: I would like to object further, with reference to this conversation, being an oral conversation, that it is subject to the objection made by the plaintiff, of the statute of frauds.

The Court: Of course, that is understood from our pretrial conference. That objection will be preserved of record.

Mr. McBride: That is the letter which I have set up in my complaint.

The Court: Bring in the jury.

Gentlemen, we will run until one o'clock.

165 Mr. T. R. Sherwin: That is quite all right.

The Court: We will run until one o'clock and resume at 2:30.

Mr. J. L. Sherwin: As far as I am concerned, three o'clock is all right.

The Court: No. 2:30.

(The following further proceedings were had in the presence and hearing of the jury:)

The Court: You may proceed.

By Mr. J. L. Sherwin:

Q. Mr. Wolfe, did you have a conversation in the early morning of June 6th, the morning of June 6, 1946, with Mr. Lehtin, at the office of Central States Cooperatives, Inc., at the address you gave?

A. I did.

Q. Relate the conversation, what was said to Mr. Lehtin and what he said to you concerning the subject matter at hand.

A. I told Mr. Lehtin who I was and the company that I represented, and asked him if he would give us a lease to continue on in the building. I explained to him that we had three months time under the lease with the previous people. There was a conversation. I asked him if
166 he had actually purchased the building and whether or not he would be willing to show me a record of his payment on the building.

Q. You mean the payment that was referred to in the letter, of $10,000?

A. Yes. I asked him if he would show me that. We had had another—

The Court: Never mind.

Mr. J. L. Sherwin: Keep it to this subject matter only.

A. I asked him if we could have a lease on the building, and he said, "We will be glad to lease you the dock."

Q. Pardon me. You talk about the building. Do you mean the premises in question?

A. That is right.

Q. All right.

A. He said, "Well, we will be glad to lease you the dock. We have no use for that."

And I said, "Well, of course, we can't just lease the dock. We have to have an office and garage, and the dock isn't any good without the office and garage."

And he also had some conversation with me at that time about some canned goods he was getting in, and he wanted to get within the building within the next
167 thirty days.

Q. By "building," did he state garage, or did he use the term "building"?

A. He stated "garage."

Q. All right. What did you say about that?

A. Well, I told him that we will be glad to work out anything where they could use part of it, and he said, "Well, all we would like to do is just lease the dock space to you."

Well, I explained to him that could not be leased, it would have no value to us because, first of all, I told him, there were no plumbing facilities in the dock space, and that the office was part of the dock. That was the original conversation.

I said to him, "Well, now, why can't we work something out? We just don't have any place to go, and we could proceed to build a building and get it rather promptly, but can't we work something out where you have a place for your canned goods?" And I even told him if he would get along with us we would move his canned goods. We are in the trucking business, and we would do that without charge.

Q. What did you say as to the alternative, if you could not get a lease?

168 A. I told him if we could not get a lease with him we would definitely buy the property.

Q. And what did he say to that?

A. He said, "Let me think it over until 4 o'clock this afternoon, and you call me."

Q. Have you related the substance of the conversation concerning the subject matter at hand between yourself and Mr. Lehtin?

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A. Well, I believe there was some more conversation with Mr. Lehtin about getting in during the ninety-day period that we had.

Q. That is, during the period of your then existing lease?

A. That is correct, and he wanted to know if it would be agreeable to go onto the property and make some measurements and build, I believe he said, a tin shed about the size of our present garage.

Q. Where? Did he indicate or state?

A. I am not certain of that. I know they made some measurements later.

Q. We will talk about that later. Did you have some conversation? Did you telephone and talk to Mr. Lehtin on the telephone at four o'clock p. m., or approximately that, of June 6, 1946?

169 A. I called him at 4 o'clock that afternoon.

Q. And did you recognize his voice as that of Mr. Lehtin?

A. Yes, sir.

Q. State what you said to him and he to you.

A. I asked him if he had come to any conclusion as to whether or not he was going to lease this building and whether or not we were going to buy it. He said, "I want you to see a Mr. Richter. I want you to see Mr. Richter."

Q. Did you know Mr. Richter? Had you ever met him?

A. I had not at that time.

Q. Relate what he said about Richter, and who he was and what his authority was.

A. Mr. Richter was the real estate man.

Q. Did he say that?

A. Well, I knew who Richter was.

Q. Can you tell us the conversation, please, on the phone now?

A. I asked him if he had the—if he was going to lease the building to us.

Q. The premises in question?

A. That is correct, until we build our new one, or whether or not we were going to be forced to buy it.

170 And he said, "I want you to see Mr. Richter," and he did give me the name of the real estate company. I believe it is Seay & Thomas. I am not certain of the

name. I believe it is Seay & Thomas Real Estate Company. I said to Mr. Lehtin, "What do I want to see Richter about? We are dealing on a matter of hours."

He said, "That is all right. You talk to Richter. He is in a position to talk for us."

Q. Did that in substance conclude that conversation?

A. Yes, it did.

Q. Did you have occasion then to telephone Richter immediately thereafter?

A. I called him immediately after this conversation.

Q. Was that at the offices of Seay & Thomas?

A. Yes, sir.

Q. Did you see and talk with Mr. Richter? This is just a general conversation first, concerning this lease?

A. I did.

Q. Was that on the telephone?

A. I spoke to him immediately after my conversation with Mr. Lehtin, and I made an appointment—

Q. Pardon me. Did you enter into any discussion about a lease, or did you make an appointment for a subsequent meeting?

171 A. We discussed no lease at that time. I asked him if I could not see him.

Q. What did you say to him?

A. He said I could. I told him of my conversation with Mr. Lehtin.

Q. Following that conversation did you see and talk with Richter anywhere?

A. Yes, I did.

Q. When?

A. The following day, at the real estate office of that company.

Q. When you talked to Richter on the telephone did you ask for an immediate appointment?

A. Yes, I did.

Q. What did Mr. Richter tell you?

A. He couldn't meet with me. I asked to meet with him in the morning, as I recall it, on the following day, and he said the earliest he could meet with me was the following afternoon, which would be on the 7th.

Q. June 7, 1946. On that day, June 7, 1946, did you go to the office of Seay & Thomas, a real estate firm? Did you go to their office?

A. I did.

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Q. Did you talk to Mr. Richter?

172 A. Yes.

Q. Do you know his first name, please?

A. I believe it is Edward Richter.

Q. Relate the conversation you had with Richter.

Mr. McBride: I wish to object on the ground that what may have happened at this office is not binding on the plaintiff in this case.

The Court: It is not binding at the present time. If counsel does not connect it up it will be stricken.

Mr. J. L. Sherwin: Thank you. That is our promise to the Court.

The Court: Proceed.

By Mr. J. L. Sherwin:

Q. Relate the conversation you had with Richter. What did you say and what did Richter say?

A. The first thing that—I don't recall verbatim that particular conversation, but the first thing that I wanted to know from Richter was whether or not these people had actually purchased the building.

Q. Name the people.

The Court: Confine the conversation.

The Witness: I asked Mr. Richter to show me evidence that the Central States Cooperative had actually purchased this building.

173 By Mr. J. L. Sherwin:

Q. Had actually entered into a contract to purchase?

A. I wanted them to show me a record of a check or some memorandum that there had been a payment between the Central States Cooperatives and Morse.

Q. What did he say?

A. Well, that went on for a couple of hours. They just refused to show it to me, and that was most of our conversation in that real estate office.

Q. Following that did you discuss anything concerning a lease?

A. Yes, we did.

The Court: What do you mean by "following that," Counsel? Do you mean the same day or—

By Mr. J. L. Sherwin:

Q. In that same conversation did you have any discussion following a lease?

A. Yes, I did.

Q. Relate what was said by you and what was said by Richter concerning that subject.

A. I want to state they finally did show me about that $10,000 that was paid. They brought in a piece of paper, at least, telling me the payment had been made by the Central States.

174 Q. That satisfied you as to an existing contract to purchase?

A. Yes, they did. At least they brought in a piece of paper showing $10,000 received.

Q. Then you finally started discussing the lease?

A. Yes.

Q. What did you and Richter say?

A. I told Richter we had previously—when we went into this same building, almost six or seven months before that, the previous tenant was also building a building, and the building was not ready, and we worked together and it was satisfactory to everybody, and I asked Richter if we could not work with these people until our building was complete, and he said we could work it out some way. He again asked if we would not just take the dock.

Q. What did you say?

A. I told him it was a physical impossibility, we just couldn't run the trucking business with just a dock, and I made an alternate suggestion.

Oh, they said they wanted to get in the building. Richter said that Lehtin's big point was that he wanted to get a building on the premises so that he could put the fall canned goods, which were going to be in in about thirty 175 days, into that building right away.

Q. That was still during the term of your existing lease?

A. Yes. I told him it would be perfectly agreeable if Lehtin went on the property and built the shed, and we would charge him nothing for it, and the only thing I asked him to do was not block the passageway so that at least we would have a way to get around it, and they assured me that would be done.

Q. By getting around it, you mean with your trucks?

A. Yes.

Q. Then what happened?

A. Richter was not sure that Lehtin would agree on that, but the final outcome was that I said to Richter, "If

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you will just leave us in the building long enough to build our new building, we have got the ground already, we will pay you an additional $150 a month, which would make it a thousand dollars a month for this property, and see if you can't work that out." And he said, "I will talk to Mr. Lehtin and I will let you know."

Q. Did that conclude the conversation?

A. That concluded the conversation at that time.

Q. When was he to let you know? Did he tell you?

A. He was to let me know that afternoon.

176 Q. Did you then go on to your offices on Iron Street?

A. Yes, sir.

Q. Did you receive a phone call there or did you talk to Richter following that conversation you just have related?

A. Richter came personally to the offices at 35th and Iron.

Q. What time, approximately?

A. Late afternoon of the 7th.

Q. Did you have a conversation with him on that occasion or did you do anything in and about the premises?

A. Yes. I took Mr. Richter out onto the dock, and I was still talking about trying to cooperate with these people, and they with us.

Q. So that it is clear in my mind, and the jury's, the dock is merely a loading platform with an overhanging roof, is that right?

A. Yes.

Q. It does not enclose a warehouse area?

A. The dock, Mr. Sherwin, is a concrete platform which is about the height of the top of this jury box, and there are doors on each side, one side where you unload and the other side where you load. I took Mr. Richter out

177 onto the dock and I showed him why I was referring to the physical impossibility of just using the dock alone.

Q. Tell the jury what you told Mr. Richter.

A. I said, "If you use the offices and the garage and we use the dock, there isn't any plumbing of any kind and therefore we would both have to share it," share the offices, that end of this thing, and I said, "I am willing to do that," and I walked out onto the dock platform with him, and I said, "We will build a plywood platform and close off one set of doors."

Q. Do you mean a plywood partition?
A. I was thinking of a plywood partition, yes.
Q. You called it a platform. Go ahead.
A. I meant partition, and just bring those two doors down and use that for our building and despatching office, and I also told Richter that even that wouldn't be enough room and I would have to have part of the office.

He said, "Well, would you pay a thousand dollars and give these people the right to build the shed, and you build the partition?"

I said, "No. If they are going to use part of the premises, then surely it shouldn't be worth any more than
178 $600."

And he said—well, there was a lot of conversation. He told me how valuable the property was, and so forth and so on.

And it was finally agreed, he said, "Well, can they come on this property right away and put up this shed?" I believe it is north of the garage.

And I said, "You can." I also told him, "You could use part of the other garage." It was not determined exactly how much or what part of the office. It was let hanging fire, and he said, "What will you pay for that much?"

I said, "Well, I will tell you what we will do. We will continue to pay $850 a month and we will let these people have part of the office, part of the garage, and construct the shed without any charge to them."

Q. Who was to construct the shed?
A. They were, at their expense.
Q. You would permit them to go on the premises?
A. Yes, even before.
Q. For what period of time?
A. They could go on immediately.

Q. I am talking about what was the extent, how long
179 were you to rent the premises? Did you agree upon that?

A. Yes, sir, we did.
Q. What was said?
A. I asked Mr.—no, he said, Lehtin wanted us to get off the property as quick as he could, and he says, "Can you get off?"

I told him, "Three months after our present three months lease and," I said, "I talked to contractors about our present building, and they explained they could possibly con-

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struct a building in five or six months, but that I had had previous experience with contractors and building, and I just didn't feel we could get out of there within a year. We had three months, and I said it would take another nine months, and I also said to Mr. Richter, "If the contractor can get us into the thing in six months—"

Q. Into your new premises?

A. Yes, "we will leave in six months, and if it will take nine months—"

I definitely agreed with him we would have a lease for nine months time.

Q. From the expiration of the existing lease?

A. Yes, three months, and I told him it would be for $850 a month, giving the Central States Cooperatives
180 also use of the same property, and he said, "That is a deal."

Mr. J. L. Sherwin: Mark this Defendant's Exhibit 3 for identification.

(Said document was marked accordingly.)

Mr. J. L. Sherwin: May I have a moment to confer with my co-counsel?

Q. What did you say to Mr. Richter and he to you concerning a memorandum in writing or a written document confirming what you had agreed upon?

A. I told him I wanted a memorandum. I originally asked him for a lease in writing, and he said, "We haven't got time for that, we are just dealing with hours," and I said, "Can't we get together right away and get a lease drawn up?"

He said, "Wouldn't a letter from Central States Cooperatives be good enough?"

And I said, "Yes, that will be all right." That was that.

Q. Did you discuss getting in touch with Lehtin?

A. Later I called Richter on the telephone. That was later. That was the following morning.

Q. Saturday?

A. Saturday morning, and he said they were hav-
181 ing some trouble getting ahold of Mr. Lehtin, and would a letter signed by Mr. McBride be sufficient?

Q. Had you met Mr. McBride before?

A. No, I hadn't.

Q. You have since learned him to be the gentleman who is seated there, Thomas McBride?

A. Yes. I told him I wanted Mr. Lehtin to sign this

thing, that this was the final day, and we had to have a signature from Mr. Lehtin, and he said the letter had been written by McBride and he would take it, as I understand it—I am not certain about this—but anyway he promised to get me the signature of Mr. Lehtin.

Q. When and where were you to get that letter?

A. I was to pick up the letter at the office of Mr. McBride.

Q. At what time?

A. I was supposed to pick it up that noon.

Q. Had you booked reservations for a train out of Chicago to Omaha?

A. Yes.

Q. At what time?

A. At noon.

Q. Did you go to Mr. McBride's office?

A. Yes.

182 Q. At what time?

A. It was right at noon, I believe two minutes before train time.

The Witness: On the 8th, your Honor.

By Mr. J. L. Sherwin:

Q. I show you now a letter dated June 7, 1946. Where did you get that?

A. At Mr. McBride's office.

Q. On what date?

A. On June 8th.

Q. When you got it, was it in the fashion it is now, or in an envelope, or do you remember?

A. I believe it was open.

Q. What did you do when you got the letter?

A. I simply looked to see that Lehtin's signature was on it, and told Mr. McBride that I was sorry, I had a man waiting in the car downstairs for me and that I had to run. I was there actually less than a minute.

Q. Did you stop at that time to read the letter or discuss it?

A. No, we didn't.

Q. When did you first actually read the letter?

A. On the train.

183 Q. Did you have occasion to tender the October rent for the premises, $850?

A. I did.

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Mr. J. L. Sherwin: Mark this Defendant's Exhibit 4.

(Said document was marked accordingly.)

Mr. J. L. Sherwin: Mark this Defendant's Exhibit 4a for identification.

(Said document was marked accordingly.)

By Mr. J. L. Sherwin:

Q. I show you Defendant's Exhibit 4, a letter on the Central States letterhead, and 4a, an envelope. After tendering the rent did you receive that letter, returning the rent for October, 1946?

A. We did.

Q. And it identifies the check by number and amount as being $850?

A. That is correct.

Q. 7144 was your check number?

A. Yes.

The Court: What is the amount of the check and the date it was sent, and when returned?

The Witness: It was there, Mr. Lehtin's signature, I believe, returning the check and identifying it as being a check of October 2d.

184 Mr. McBride: Central States returned the offer of the payment of $850 for—

The Court: On October 2, 1946?

Mr. McBride: Yes.

Mr. T. R. Sherwin: It was returned on October 2d, but it was tendered prior to the October 1st date.

Mr. J. L. Sherwin: I should like further to identify one other document or two.

(Whereupon said documents were respectively marked Defendant's Exhibits 5, 6 and 7, for identification.)

Mr. McBride: Counsel has shown me some documents.

Mr. J. L. Sherwin: We have nothing up our sleeve on that.

Mr. McBride: I haven't seen the documents before, and I cannot at this moment state whether I would agree to them upon an opportunity for examination, or not.

Mr. J. L. Sherwin: The purpose of offering it is to give a physical picture of the premises in question.

The Court: These are merely drawings and photographs?

Mr. J. L. Sherwin: That is right, of the physical premises. There is no question about it.

The Court: You will have plenty of time to look at them during the noon hour.

185 Mr. J. L. Sherwin: Yes, certainly. In the meantime you may cross-examine, Mr. McBride.

The Court: Proceed with your cross-examination.

Cross-Examination by Mr. McBride.

Q. Mr. Wolfe, showing you Defendant's Exhibit 2, do you know when Watson Bros. Transportation Company received that document?

A. I believe we received it either the 29th or on June 1st, the first time I believe I saw it. I am not certain about it.

Q. Do you know when Watson Brothers received it in their offices?

A. No, I wouldn't have any way of knowing.

Q. When is the first time you saw it?

A. I believe on June 1st, the day after Decoration Day.

The Court: Who would know when it was received in their office, if you don't?

The Witness: I don't believe anyone would, your Honor.

By Mr. McBride:

Q. Was that letter sent to you registered mail, do you know?

A. I don't know, Mr. McBride.

186 Q. When you came to Chicago, whom did you first see?

A. Mr. Lehtin.

Q. And what time of day was it you saw him?

A. I would judge it was around ten o'clock in the morning, 10:30.

Q. Who was present at that time?

A. There was myself and Mr. Lehtin and one of his men, and a man by the name of Al Richmond, who was with their company at that time.

Mr. McBride: If the Court please, prior to continuing with the cross-examination of this witness, I would like to renew the motions which I made concerning the conversations which were had between Mr. Wolfe and Mr. Lehtin on the one hand, and between Mr. Wolfe and Mr. Richter on the other.

The Court: Has the defendant anything further to offer by way of connecting up these parties?

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Mr. J. L. Sherwin: Nothing further, your Honor.

The Court: The testimony will be stricken.

Mr. J. L. Sherwin: We will respectfully note an exception to the ruling of the court.

The Court: Testimony of conversations of this witness with Mr. Lehtin and Mr. Richter will be stricken, in the absence of further testimony connecting them up with
187 the plaintiff.

Have you any further cross-examination in view of that ruling?

Mr. J. L. Sherwin: Does your Honor—

The Court: You said you would connect it up, and you haven't done it. The testimony is stricken.

The jury may be excused until 2:30.

(The following further proceedings were had, out of the presence and hearing of the jury:)

Mr. J. L. Sherwin: I have another letter to offer.

The Court: Let the record show the jury is withdrawn.

Mr. J. L. Sherwin: I will ask an opportunity to offer another letter signed by Mr. McBride, which in substance—

The Court: Let me see it.

Mr. J. L. Sherwin: Pardon me.

Mr. McBride: That is one of the letters set up in our pleadings, Judge.

Mr. J. L. Sherwin: It is a letter in which they practically say in so many words that they are discussing the lease—

The Court: This is set up and admitted by the pleadings and it is not necessary to put it in the record any further.

188 Mr. J. L. Sherwin: I don't know what position we took on this letter in the pleadings.

Mr. T. R. Sherwin: I admitted receipt of the letters, but I don't think the contents—

The Court: They are set up in the pleadings?

Mr. T. R. Sherwin: I do not recall, your Honor—

The Court: You admit the receipt of them?

Mr. T. R. Sherwin: Yes.

The Court: And the plaintiff alleges the sending. What more is there to prove?

Mr. T. R. Sherwin: The contents of the letter states that the lease was drawn and presented to Mr. Wolfe at the request of Mr. Richter and Mr. McBride, as the attorney for Central States, who signed the original memorandum, states in effect that Richter is authorized to act for them.

Mr. McBride: No.

The Court: Just a minute. This is all set up and admitted by the pleadings.

Mr. McBride: That is correct.

The Court: So that is out the window.

Mr. J. L. Sherwin: I respectfully direct your Honor's attention to the letter, wherein Mr. Lehtin approves an action taken by McBride for Central States Cooperatives.

I do not quite understand their position. Do they con-
189 tend that Lehtin was not authorized to deal for the company?

The Court: That is not for them to prove. That is for you to prove.

Mr. T. R. Sherwin: We contend the documents taken together, together with the statement of Mr. Lehtin, show that Richter was authorized to act for them, and the subsequent letter signed by McBride, approved by Mr. Lehtin, and the letter signed by McBride, state that Mr. Wolfe had a lease, that Mr. Richter had authority to act and submitted a lease at his request, and the subsequent conduct of Richter, and following through everything that was said about it, and the subsequent supposed inability to get Mr. Lehtin, and the subsequent letters where Lehtin attempts to sidestep the issues and get out of the lease that Richter had bound him to—

Mr. McBride: What they have shown, your Honor, has to do with an offer made by Central States Cooperatives with respect to a lease of the dock space. We made such an offer to lease the dock space. We do not question that. What they seek to prove here under the pleadings was a lease of the entire premises including the garage and office

space. The Central States needed that garage office
190 space in which to move.

The Court: It is the contention of the defendant that there was a new lease to become effective for the period of a year from June 30th for $850 a month, for part of the premises.

Mr. T. R. Sherwin: Yes.

The Court: That is an entire shift of position from that previously taken. You refer to $650 in a letter.

Mr. T. R. Sherwin: We contend this is a counteroffer. This is to show the authority of the people to act, and this is a change of position on their part.

The Court: Assuming they had authority to act, have you anything further to offer?

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Mr. T. R. Sherwin: No.

Mr. J. L. Sherwin: Before we answer that, I most respectfully urge that we have the benefit of this lunch hour adjournment to review what we have put in. I do not see how anyone can be hurt by that, and when we resume we may have some suggestions to make to the court, and we will ask for certain rulings.

Mr. McBride: I wish to observe that what this witness has testified to is not an agreement. He did not state at any time the parties made any agreement for the leas-
191 ing of the entire premises as set up in their defense.

The Court: The authorities are clear that when you seek to avoid the statute of frauds—

Mr. T. R. Sherwin: It must be a clear contract.

The Court: It must be clear, definite and certain, and leave no reasonable doubt. Those are the exact words that the Supreme Court has used. You are a long way from that, gentlemen.

Mr. J. L. Sherwin: May I take respectful exception to your Honor's conclusion?

The Court: I haven't made any final rulings.

Mr. T. R. Sherwin: The Court is making a correct statement of the law.

Mr. J. L. Sherwin: That is correct, but you say we are a long way from it.

The Court: I say you are an awfully long way from it.

Mr. J. L. Sherwin: May I respectfully beg to differ? Lawyers have differed with courts.

The Court: Yes, but lawyers do the urging, and judges do the deciding.

Mr. T. R. Sherwin: Yes.

Mr. J. L. Sherwin: You are the boss.

The Court: No. The law is the boss.

Mr. J. L. Sherwin: I say you are the authorized agent, as we contend Richter was.

192 Can we have the benefit of the lunch hour?

The Court: Cicero says that the lawyer is the silent law, and the magistrate is the speaking law.

Up to the present time on this record you are a long way from proving something beyond a reasonable doubt in the way of an oral contract for a lease.

Mr. J. L. Sherwin: Pardon me?

The Court: I also understood at our pre-trial conference your company continued to pay $850 a month until

the time it came to a showdown, and then the check was refused.

Mr. J. L. Sherwin: Yes, and we tender $850.

The Court: They paid $850 to September, and in October it was refused.

Mr. T. R. Sherwin: Yes.

The Court: That is at variance with your claim of $650.

Mr. J. L. Sherwin: No.

Mr. T. R. Sherwin: The pleadings show $850.

The Court: And in the letter now you say $650.

Mr. J. L. Sherwin: We contend that is a change of position on their part, that in the rush to get to the train—he had a definite agreement before he went to McBride's office for $850, and the letter shows they were authorized to act, and if they were authorized for this purpose
193 then they were authorized to talk to Mr. Wolfe.

Mr. McBride: Authority, Judge, to make a lease on a portion of the premises, that is, the dock space.

The Court: I am merely pointing out to you at this time you are a long way from any of the rules laid down by the courts, whereby a partial performance will take a contract out of the statute of frauds.

Mr. T. R. Sherwin: May we have until 2:30?

The Court: Yes. If there is something new to present—I understand your evidence is closed, so far as any further proof of authority on the part of the alleged agents is concerned.

Mr. T. R. Sherwin: Yes.

Mr. J. L. Sherwin: But we want to offer the other letter.

The Court: It is already in the record.

Mr. J. L. Sherwin: I beg your pardon?

Mr. T. R. Sherwin: I am not certain that it is.

The Court: It is already in the record. It is alleged that it was sent and received.

Mr. T. R. Sherwin: I want to put it in.

The Court: It is in.

Mr. J. L. Sherwin: They acknowledge it is in, and the court says it is in, but we will discuss that when
194 we come back.

(Thereupon a recess was taken until 2:30 o'clock p. m. on the same day, December 23, 1946.)

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195 December 23, 1946,
2:30 o'clock p. m.

Trial resumed pursuant to recess.

Present: Same as before.

(The following further proceedings were had out of the presence and hearing of the jury:)

Mr. J. L. Sherwin: At this time, if the Court please, I should like leave to recall Mr. Wolfe for the purpose of offering into evidence this letter of June 25th, which your Honor pointed out, and we agree, is pleaded, and another letter dated June 17, 1946, signed by Edward L. Rich-
196 ter, on the stationery of Seay & Thomas.

The Court: Is there any objection to them going into the record?

Mr. McBride: The letter of June 25th is pleaded. I don't know what the witness may testify as to the letter of Mr. Richter.

Mr. J. L. Sherwin: He will say he got it in the regular course of business, and signed by Richter, and that he recognizes his signature.

Mr. McBride: I would object to the exhibits offered as evidence of authority of Mr. Richter to bind the plaintiff to an oral contract for the lease of these premises.

The Court: Of course, that is a matter of inference or argument, and not a matter he may testify to. It would not be in his power to testify to it.

Any objection to them going in the record?

Mr. McBride: I object as not competent evidence of authority of Mr. Richter to act.

The Court: They will be admitted for what they are worth.

(Said exhibits, so offered and received in evidence, were marked respectively DEFENDANT'S EXHIBITS 8 and 9.)

197 Mr. J. L. Sherwin: So that our position is clear, I want to recall Mr. Wolfe for one or two questions on direct examination, or to reserve our right to recall him and ask him these questions on redirect.

The Court: What do you wish to ask?

Mr. J. L. Sherwin: Question No. 1 of Mr. Wolfe:

Did Watson Bros. Transportation Company exercise its option to purchase?

To which we expect his answer will be "No."

Question No. 2:

Why?

And his answer to that question:

Because of the oral lease he had concluded with Mr. Richter, as he outlined in his testimony.

Mr. McBride: The first question is covered by the pleadings. They allege in their answer the option was not exercised. The question as to why is not material.

The Court: Let the record show he would so testify if called.

Mr. J. L. Sherwin: Thank you.

The Court: Anything further?

Mr. J. L. Sherwin: We have another witness, Mr. Lehtin.

The Court: Very well. Bring in the jury.

198 (The following further proceedings were had in the presence and hearing of the jury:)

Mr. J. L. Sherwin: May the record disclose we are now going to call Mr. Lehtin under Rule 43(b) as an adverse witness.

Mr. McBride: I would like to ask Mr. Wolfe one or two questions on cross-examination.

The Court: There is no showing as to anybody being an adverse witness. You may call the witness if you wish.

Call Mr. Lehtin.

(Witness sworn.)

Mr. J. L. Sherwin: I assume your Honor first wants a showing that he is an adverse witness.

The Court: I don't want anything. Ask your questions. I will rule on them.

Mr. J. L. Sherwin: For the record then, is your ruling that—

The Court: There is nothing before me to rule on, Counsel.

Mr. J. L. Sherwin: Thank you.

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199 LAURIE L. LEHTIN, called as a witness herein on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. J. L. Sherwin.

Q. What is your name, please?
A. Laurie L. Lehtin.
Q. Where do you live, Sir?
A. I live in the city of Chicago.
Q. Your address, please?
A. 3923 West Adams Street.
Q. For the record, your age, Sir?
A. Thirty-six years old.
Q. By whom are you now employed?
A. I am employed by Central States Cooperatives, Inc.
Q. And in what capacity?
A. I am called general manager.
Q. How long have you been employed as general manager for the company in any way?
A. I have been employed as general manager since January 1, 1943.
Q. And you are by training a certified public accountant?
200 A. That is right.
Q. Are you a stockholder of Central States Cooperatives?
A. No.
Q. Are you a member of its board of directors?
A. No.
Q. Are you an officer of that company?
A. No.
Q. But you are the general manager, is that correct?
A. Yes.
Q. And as such general manager, briefly, what are your duties?
A. My duties in brief are to supervise the merchandising activities of the corporation, to hire and fire (except for division heads, of whom I secure the approval of the board of directors), to make reports to the board, to secure their approval on various actions, to follow the policies laid down by them and the stockholders.
Q. In substance, you are the operating executive of the company?

A. No. I am the general manager.

Mr. J. L. Sherwin: Our motion now is to call the witness, in view of the showing, under Rule 43(b) as an
201 adverse witness for the purpose of examination without being bound by his answers.

The Court: You may ask questions. I will rule on them as they come along.

By Mr. J. L. Sherwin:

Q. Did you have with you or is there present in court the contract to purchase the property in question?

Mr. McBride: Are you directing that question to me, Counsel?

Mr. J. L. Sherwin: I am asking that of the witness first.

A. I believe that our attorney has the contract for the purchase of this,—

Mr. McBride: Let the record show I am handing counsel for defendant a document marked Plaintiff's Exhibit 3 for identification.

The Court: What is the purpose of this, Counsel? Is there any question about the contract having been made?

Mr. McBride: No, there is not any.

The Court: There is no such question raised by the pleadings.

By Mr. J. L. Sherwin:

Q. And have you entered into any lease with any person for the premises in question—withdraw that.

202 Has Central States Cooperatives, if you know, entered into any lease with any person, firm or corporation for the premises in question, or any part of said premises, since October 1, 1946?

A. None that I know of.

Mr. J. L. Sherwin: That is all.

The Court: That is all.

(Witness excused.)

The Court: Anything further, Counsel?

Mr. McBride: Yes. Does your Honor desire to ask any questions?

The Court: No. I am asking opposing counsel if they had anything further, that's all.

Mr. J. L. Sherwin: Do you want to ask him anything?

Mr. McBride: I wish to ask him some questions, who is president of the Central States Cooperatives—

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The Court: You are going into matters that are not proper cross-examination and I do not propose to spend the court's time on things that are not material to the issues, and that are not proper cross-examination.

Mr. J. L. Sherwin: We are not interposing any objection.

The Court: I know you are not, but the court is. I am not here for the purpose of allowing immaterial
203 matters to be discussed, if I can avoid it. There is nothing raised on direct examination that makes that proper cross-examination.

Mr. J. L. Sherwin: What is your attitude on these?

Mr. McBride: I have not had sufficient time to inspect them.

Mr. J. L. Sherwin: For the record then, we offer these exhibits.

The Court: They may be admitted.

Mr. J. L. Sherwin: They are marked Defendant's Exhibits 5, 6 and 7 and purport to be photographs of the side and front elevations, side and rear elevations of 3201 South Iron Street, one being a plat and the other a survey.

The Court: They may be admitted in evidence.

(Said documents, so offered and received in evidence, were respectively marked DEFENDANT'S EXHIBITS 5, 6 and 7.)

204 Mr. J. L. Sherwin: For the record, we should like to read into the record all of the exhibits not heretofore read into the record, other than—

The Court: They will be considered as in the record.

Mr. J. L. Sherwin: Considered as read to the jury?

The Court: Yes.

Mr. J. L. Sherwin: May we ask leave at this time to submit for the record photostatic copies of all these exhibits in lieu of the originals?

The Court: That may be done.

Mr. J. L. Sherwin: Thank you very much.

Defendant rests.

Whereupon Defendant Rested Its Case in Chief.

Mr. McBride: Plaintiff at this time, if the Court please, wishes to make a motion to direct a verdict for the plaintiff.

The Court: Motion allowed.

Mr. J. L. Sherwin: And exception to the action of the Court.

The Court: Have you any suggestions as to the amount of damages? I think the statute calls for double rent.

Mr. McBride: Yes. However, in this complaint I have not made any prayer for the allowance of damages.

The Court: Very well. Have you a form of verdict?

Mr. McBride: I have the form of motion for the
205 direction of a verdict, and a form of the instruction to the jury. I have a copy which I haven't submitted to counsel, of both documents.

Mr. J. L. Sherwin: May I have an opportunity to peruse these?

The Court: The evidence in this case, ladies and gentlemen, is not sufficient to warrant any but one verdict, and I am, therefore, directing you to find a verdict for the plaintiff and against the defendant.

The Clerk will give you a form of verdict which you will sign. As a matter of law, there is not any evidence here that requires any consideration.

The record will show motion for directed verdict is allowed.

Mr. J. L. Sherwin: May the record disclose exception on behalf of the defendant to the action of the court?

The Court: Let's get this out of the way first. Fix your record afterward.

Mr. J. L. Sherwin: Thank you.

The Court: Have you a form of verdict?

Mr. McBride: Yes, I have the form of verdict, your Honor. This is the form of verdict.

The Court: If you wish to go to the jury room to sign it, you may do so.

206 (The following proceedings were had out of the presence and hearing of the jury:)

Mr. T. R. Sherwin: I think the Illinois statute says "wrongfully withholding" and not "unlawfully." We would have an objection to that.

The Court: If there is any distinction between the two terms I don't know what it is.

Mr. T. R. Sherwin: I don't either, but I want to follow the statute.

Mr. J. L. Sherwin: May I offer a distinction? That which is unlawful may be illegal and give rise to a crime, and that which is wrongful may be improper and give rise only to a tort or to remedy for violation of contract. We, on behalf of the defendant—

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The Court: If there was anything unlawful, it was wrongful, wasn't it?

Mr. J. L. Sherwin: Respectfully, your Honor, I don't want to engage in splitting hairs—

The Court: Somebody is splitting hairs. I don't know whether it is you or I.

Mr. J. L. Sherwin: It may be I.

The Court: If it is unlawful it is wrongful, isn't it?

Mr. J. L. Sherwin: It might be both, but I don't want to say which. I am giving you my reasoning. That
207 which is unlawful may be illegal, and that which is wrongful may be not illegal. It may be a contractual matter.

Mr. T. R. Sherwin: The statute says: "unlawfully."

The Court: I think the withholding is unlawful and wrongful.

Mr. J. L. Sherwin: So that the record is complete, the defendant now, by its counsel, objects to the motion for the directed verdict tendered to the court because it is improper in form, and for that reason alone thus far. And the defendant further wishes to note an exception to the action of the court in instructing the jury in the terms that it has and, for the record, we take exception to the form of verdict tendered by the plaintiff and given to the jury by the court, and to the action of the court in overruling our objections—I assume they are all overruled—or to all the action of the court here taken, the defendant duly objects and excepts.

The Court: I am finding as a matter of law that the evidence offered by the defendant in an effort to prove affirmatively a verbal lease is not sufficient to take the case out of the statute of frauds, and that is void. That is the substance of my holding, as a matter of law.

Mr. J. L. Sherwin: All right.

208 The Court: I don't know the exact form of verdict. I don't think it makes any difference.

Mr. J. L. Sherwin: There being no application or prayer for damages, I suggest most respectfully that the bond be merely in an amount sufficient to cover—

Mr. T. R. Sherwin: Would your Honor fix a bond?

The Court: That depends entirely on whether you want a supersedeas.

Mr. T. R. Sherwin: Supersedeas.

The Court: Then the bond will have to be very substantial.

Mr. J. L. Sherwin: Yes.

The Court: If you want a supersedeas, you will have to put up a very substantial bond.

Mr. J. L. Sherwin: What does your Honor deem substantial?

The Court: I don't know how long this case will take to get up to the Circuit Court of Appeals.

Mr. T. R. Sherwin: We will get up there as fast as we can.

The Court: We may find their time so occupied that it may take some time.

Mr. T. R. Sherwin: As far as the defendant is concerned, we will move promptly.

The Court: I assume the supersedeas would come 209 more properly in the Circuit Court of Appeals.

Mr. T. R. Sherwin: No, it does not. It comes from your Honor. We have to give notice, and then have the bond approved.

The Court: I should require a bond of about $1,700 a month, for a year.

Mr. T. R. Sherwin: All right.

Mr. J. L. Sherwin: That is agreeable.

Mr. McBride: The statute makes provision for the rent and damages.

The Court: There is nothing to indicate damages other than the statutory provision for double the rent.

Mr. T. R. Sherwin: That is a substantial bond.

The Court: In this case I should say the bond should be in the neighborhood of $20,000.

Mr. J. L. Sherwin: Your Honor indicated $1,700 for a year. In view of the fact that there will be a holdover until June—

The Court: How do you know? How does anybody know?

Mr. J. L. Sherwin: The most we contend is nine months.

The Court: You may change your mind and hold over another nine months.

Mr. J. L. Sherwin: $20,000 then.

Mr. T. R. Sherwin: Will your Honor be here Thursday?

The Court: I will not be here until the 6th of 210 January.

Mr. T. R. Sherwin: Your Honor, I had in mind the—

The Court: You won't find anybody over at the Circuit Court of Appeals either.

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Mr. T. R. Sherwin: No. The bond under the statute will have to be approved in at least ten days.

The Court: Can the clerk approve it, or—

Mr. T. R. Sherwin: The court must approve it.

The Court: Send it out to Freeport. I will be glad to approve it out there. I will be here until noon tomorrow.

Mr. J. L. Sherwin: We will come in before noon tomorrow.

The Court: All right.

Bring in the jury with their verdict.

Mr. McBride: I should like to mention to the court that the bond which should be fixed by the court "shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court."

We will be glad to make a showing as to what the damages will be.

The Court: Are you objecting to the amount of $20,000 as insufficient?

Mr. McBride: I think it is not sufficient.

The Court: You think it is not sufficient?

211 Mr. McBride: That is right.

The Court: I will hear you on that as soon as we get through here.

(Whereupon the jury returned its verdict, and was discharged.)

The Court: I will hear you on the question of the amount of that bond, Counsel. You think $20,000 is insufficient. I will hear anything you have to say upon that.

Mr. McBride: Yes, Judge.

Mr. J. L. Sherwin: I think it is a substantial bond.

The Court: The statutory requirement is double the rent, if I remember right.

Mr. J. L. Sherwin: Yes.

Mr. McBride: But that is not all.

The Court: I have not read that Act for a long time, but you have gone over now about three months.

Mr. T. L. Sherwin: That is correct.

The Court: $1,700 a month is money, and this case might get up to the Circuit Court of Appeals and might not be decided until next fall. I don't know.

Mr. McBride: A year and a half on the basis of double rent would be the beginning.

Mr. J. L. Sherwin: We are planning to be out of there.

212 Mr. McBride: This is the situation the plaintiff is

in. Plaintiff has been compelled to rent some premises of Fullerton Avenue for a yearly rent of $22,420.

The Court: Who has been?

Mr. McBride: The plaintiff, in order to secure premises in which to operate. I have that lease here. Use and occupation of the premises in question here would permit the plaintiff to have operated during that year for a maximum of $10,000. The plaintiff is required to pay $12,000 in rent because of conditions prevailing in the market on property at this time which he would not otherwise be required to pay.

The Court: Isn't that statutory provision exclusive of everything else?

Mr. McBride: I think not.

Mr. J. L. Sherwin: I think the statute is very plain, double the rental.

Mr. McBride: It does not say double the rental.

The Court: Isn't it a liquidated sum in lieu of other damages?

Mr. J. L. Sherwin: On the unlawful withholding section, your Honor is correct.

Mr. McBride: A tenant who holds over wrongfully is liable for double the rent, but there is nothing in the 213 provisions of the statute which makes it exclusive.

The Court: I know there is not, but wouldn't there be a strong presumption to that effect?

Mr. McBride: I looked up the cases under that section and endeavored to ascertain if that was the rule of law. There were no cases which I could find to that effect, that that was the limitation on the right of the landlord in case of a wilful hold-over.

The Court: Do you find any cases to the contrary?

Mr. McBride: No, I didn't find any cases deciding the question one way or the other.

Mr. J. L. Sherwin: $20,000 is substantial.

The Court: You have a statutory provision fixing the damages at double the rent. In the absence of some showing to the contrary I would assume that is what the statute meant, and that was a limitation as well as a penalty attached to it.

Mr. McBride: May I refer to the section of the statute which has to do with the fixing of a bond in cases of this kind, in forcible entry and detainer?

The Court: Yes. What does it provide?

Mr. McBride: Section 20, Chapter 57.

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The Court: That is the state law?

Mr. McBride: Yes. This is an action brought under the state law and removed here, and this section would
214 guide the court in fixing the amount of the bond.

"If the defendant appeals, the condition of the bond shall be that he will prosecute such appeal with effect, and pay all rent then due or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue in case the judgment from which the appeal is taken is affirmed, or appeal dismissed; which said bond shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court. And the court in which the appeal may be pending may require a new bond in a larger amount, if necessary to secure the rights of the parties; and in case of continuance, may require another bond to be given to further secure the same."

The Court: I will tell you, Counsel. The defendant here, who will be the appellant, is evidently a substantial corporation. I don't think there is any doubt about
215 its solvency. None is suggested.

Mr. McBride: I have seen a balance sheet of the corporation and it seems its liabilities are in excess of its assets. We do not feel secure in the assets of the corporation.

The Court: I will leave your bond at $20,000. If the case is not disposed of in the Court of Appeals within a reasonable length of time you may go into the Circuit Court of Appeals and apply for an additional bond.

Mr. T. R. Sherwin: The law so provides.

The Court: I think the Circuit Court of Appeals would have the power to increase the bond if there was any showing of insolvency or detriment accruing to you.

Mr. T. R. Sherwin: That is correct.

The Court: For the present the bond stands at $20,000.

Mr. T. R. Sherwin: Thank you.

The Court: If you get it in before noon, I will approve it.

The exhibits may be photostated, and the photostats substituted for the originals.

218 DEFENDANT'S EXHIBIT 1.

This Indenture made this 31st day of July, A. D. 1945, by and between Charles H. Morse, Jr., of the Village of Libertyville, Lake County, Illinois, party of the first part, (hereinafter referred to as "Lessor") and Watson Bros. Transportation Co., Inc., a Nebraska corporation, with office and place of business in the City of Chicago, Illinois, party of the second part (hereinafter referred to as "Lessee"), Witnesseth:

In consideration of the rents herein reserved and of the covenants and agreements herein contained on the part of the Lessee to be kept, observed and performed, Lessor has demised and leased and does by these presents demise and lease unto the Lessee the following premises:

That part of the North Half (N½) of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian, in the County of Cook, State of Illinois, more particularly described as follows:

Beginning at a point which is the intersection of the center line of vacated Iron Street as it exists South of vacated West 33rd Street where it is Fifty (50) feet wide, extended Northwesterly, with the North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to the Westerly dock line of the South Fork of the South Branch of the Chicago River, as occupied; thence North Forty-one degrees, thirty minutes, thirty seconds (41° 30′ 30″) West, One Hundred Sixty-six (166) feet, Eight and One-eighth (8⅛) inches; thence North Thirty-two degrees, Forty-seven minutes (32° 47′), West, Sixty-three (63) feet, Four and one-half (4½) inches; thence North Twenty-nine degrees, forty-six minutes, Twenty seconds (29° 46′ 20″) West, One Hundred Twenty (120) feet, Eleven and one-half (11½) inches, more or less along said dock
219 line as occupied to a line formed by the extension East of the South line of Lot Eight (8) of Shepard & Decreet's Subdivision of Lots Twenty-One (21), Twenty-two (22) and Twenty-three (23), in Alice Lynch's Subdivision in the Northwest quarter (NW¼) of Section thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty-eight (288)

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feet, Nine and Five-eighths (9⅝) inches, more or less, to the intersection of said line with the center line of vacated Iron Street as it exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along the said center line of vacated Iron Street (as it exists South of vacated West 33rd Street extended Northwesterly), Four Hundred Ninety-eight (498) feet and Nine (9) inches to the place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet more or less; except therefrom a tract of land bounded by a line described as follows:

Beginning at the point of beginning of the tract of land hereinabove described; thence Northeasterly on the Southerly line thereof Forty-nine (49) feet Ten and one-half (10½) inches to the East line of vacated Iron Street North of vacated West 33rd Street; thence Northwesterly along the said Easterly line of vacated Iron Street Three Hundred (300) feet, Seven-eighths (⅞) inches more or less to the intersection of said East line with the Westerly line of the tract of land hereinabove described; thence Southeasterly along said Westerly line of said tract of land to the place of beginning; containing Seven Thousand Three Hundred Seventy-nine (7,379) square feet, more or less;

Reserving unto Lessor and his assigns the right to use as a roadway the westerly thirty (30) feet of the demised premises running parallel to the West line of said premises and extending the entire length thereof.

To Have And To Hold The Above described premises unto the said Lessee for and during the term of One (1) year, commencing October 1, 1945 and ending September 30, 1946, to be occupied and used by said Lessee for the purpose of receiving, loading or unloading, transferring, shipping, dispatching or similarly dealing with freight carried by motor trucks and motor vehicles, and as a garage and repair shop and for all related purposes.

220 In Consideration of said demise and the covenants and agreements hereinafter mentioned, the parties hereto covenant and agree as follows:

1. Lessee agrees to pay as rent for said demised premises the sum of Ten Thousand Two Hundred Dollars ($10,200.00), payable in twelve (12) equal monthly installments as follows:

(a) Concurrently with or prior to the execution of this lease, Lessee has paid to Lessor the sum of Thirty-four Hundred Dollars ($3400.00) representing four (4) install-

ments of rental. One of said four installments shall be deemed to be in payment of the rental for the month of October, 1945. The remaining three of said installments shall be considered to be and is a present payment of the rent reserved for the three months next preceding the expiration of the term of this lease, that is to say, for the months of July, August and September in the year 1946 and in no event shall be deemed to be a deposit or security for the payment of future installments of rental hereunder.

(b) The remaining eight installments of rental not covered by the aforesaid payment of Thirty-four Hundred Dollars ($3400.00) shall be in the amount of Eight Hundred Fifty Dollars ($850.00) each and be paid to Lessor on the first days of the months of November and December, 1945, and January, February, March, April, May and June, 1946.

It is understood and agreed, in the event this lease shall be terminated prior to September 30, 1946, in accordance with the provisions of Paragraph 2 hereof, and if Les-
221 see shall have theretofore paid in advance, in either of the manners mentioned in (a) and (b) above, the rental for any month or month following such earlier termination date, then Lessor shall refund to Lessee promptly an amount equal to the aggregate payments of rental which shall have been so paid in advance with respect to the month or months following such date of earlier termination. However Lessor shall have no obligation to refund any amount whatever to Lessee in the event this lease shall be terminated for cause by Lessor prior to the expiration of the said term, by reason of any default on the part of the Lessee or by violation of any provision of this lease by the Lessee.

2. The Lessor may at any time, upon at least ninety days' written notice to Lessee of his intention so to do, cancel and terminate this lease in the event of a bona fide sale by Lessor of the premises.

In the event, during the term of this lease, or the extension referred to in Paragraph 18 hereof, Lessor shall elect to sell the demised premises, then Lessee shall have the right of first refusal, that is to say, the first opportunity to purchase the premises upon the same terms and conditions, and for the same conditions as Lessor then proposes to sell the premises to any other individual, firm or corporation. In the event of any proposed sale, Lessor shall advise Lessee in writing of the name of the proposed purchaser, the terms and conditions of the proposed sale and the consideration therefor, and Lessee shall have ten days

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from the receipt of such notice within which to notify
222 Lessor of its election to purchase the demised premises upon like terms and conditions and for like consideration. In the event Lessee shall not deliver to Lessor, within said ten day period, a notice of its election to so purchase the premises, then Lessor shall be free to sell the premises to the person named in and on the same terms and conditions set forth in the notice first above mentioned, and this lease shall then be subject to termination by Lessor in the manner first above mentioned.

3. Lessee covenants and agrees to pay the rental hereby reserved, and in the manner and at the time hereinabove provided, at the office of the Lessor at 600 South Michigan, Avenue, Chicago, Illinois, or at such other place in the City of Chicago as said Lessor may from time to time designate in writing. All of said rentals shall be paid in lawful money of the United States of America.

4. Lessee agrees to repair and to replace at its own expense any doors, walls, partitions or other fixtures thereof, or any part of the improvements damaged or injured by Lessee or any other person in connection with the occupancy and use of said demised premises by Lessee, and to keep said premises in a clean and healthful condition, according to the ordinances of the City of Chicago and all applicable rules and regulations established by public authorities, provided, however, Lessee shall not be required hereby to make any change in the character or nature of any permanent improvement now on the premises. Upon the termination of this lease in any manner whatsoever, Lessee will yield up possession of said premises to Lessor in good condition and repair (loss by fire and ordinary wear excepted).
223 Lessee further covenants and agrees that anyone authorized by Lessor shall have the right at all reasonable times, upon notice to the Lessee, to enter upon and examine said premises for the purpose of ascertaining for the benefit of Lessor whether the terms of this lease have been and are being complied with and for purpose of exercising any right or power granted to the Lessor under this lease.

5. Lessee agrees that it will not keep or use or permit to be kept within any part of the demised premises, any inflammable or explosive materials or liquids, excepting specifically those items which are being handled by the Lessee in the course of transportation or commerce, and further specifically excluding gasoline and oil contained in vehicles or instrumentalities for use in and about the prem-

ises in the course of Lessee's business of transportation. Lessee agrees that it will not sell or permit to be sold on the demised premises any gasoline, motor oil or motor vehicle fuels.

6. Lessee shall have the right and privilege in using, in common with others, the rail siding on the premises South and adjoining the demised premises, in so far as it is within Lessor's power to grant such use.

7. Lessee shall have the right to enter into subleases of the garage section of the building on the demised premises with individuals, firms or corporations engaged in the business of transporting freight by motor vehicle, provided, however, Lessee shall not solicit or deal with any tenant of American Terminal Company for the purpose of inducing any such tenant to rent space from Lessee in the place
224 and stead of dock space occupied under lease from American Terminal Company, and Lessee shall not have any right to sub-lease any part of the premises to any individual, firm or corporation which has been a tenant of American Terminal Company within a period of six months preceding any such attempted sub-leasing. Lessee shall have no right to assign this lease or to make and enter into any sub-lease other than a sub-lease of the garage, as aforesaid, without first obtaining the written consent of Lessor so to do.

8. In the event of the adjudication in bankruptcy or judicial reorganization of Lessee, or the appointment of a receiver of its property or business by any State or Federal Court, Lessor shall have the right, if it so elects, to terminate this lease upon, and within a reasonable time after, the happening of any of said events. Lessee further covenants and agrees that during the term of this lease it will not use, suffer or permit any person to use said premises or any part thereof, for any use or purpose in violation of the laws of the United States, the State of Illinois, or the ordinances of the City of Chicago, or for any purpose that will be injurious to the premises or increase the fire hazard of said building.

9. The Lessee agrees not to engage in or permit others to engage in the manufacture, sale or giving away of either spirituous, fermented or intoxicating liquors on said demised premises or on any part thereof, and agrees that it will, at all times, keep the demised premises and the Lessor harmless from any and all loss, liability, suits, claims, costs, expenses and damages resulting from or caused in whole or

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in part by the manufacture, sale, or giving away of alcoholic liquors in, upon or about the demised premises, whether with or without the knowledge of Lessee, by any persons, firms or corporations whatsoever, whether such liability is based upon any statute of the State of Illinois, or upon the common law or otherwise, or arising out of the violation of any statute, ordinance, regulation or duty imposed by the common law or otherwise.

10. Lessee agrees that during the term of this lease it will not alter or cause to be altered any part of the demised premises, nor will it construct or cause to be constructed any addition thereto or any improvement thereon, unless Lessee shall have obtained the written consent of Lessor so to do.

11. Lessee agrees that it will not permit any mechanic's lien or liens to be placed on said premises or any improvement thereon or addition thereto, during the term of this lease, and in case of the filing of any such lien Lessee will promptly pay the amount thereof and cause said lien to be discharged. If default in payment thereof shall continue for twenty (20) days after written notice thereof from Lessor to Lessee, the Lessor shall have the right and privilege, at Lessor's option, of paying and discharging the same or any portion thereof, without inquiring as to the validity thereof, and any amounts so paid, including expenses and interest, shall be so much additional indebtedness hereunder due from Lessee to Lessor, and shall be paid to Lessor immediately upon rendition of a bill therefor.

12. Lessee further covenants and agrees that if default shall at any time be made by it in payment of the rent when due as aforesaid and shall continue for ten (10) days after notice in writing thereof to Lessee, or if default shall be made in any of the other covenants, agreements or undertakings herein contained to be kept, observed and performed by the Lessee, its successors or assigns, and such default shall continue for twenty (20) days after notice thereof in writing to the Lessee, it shall and may be lawful for the Lessor, at its election, to declare the said term ended and to re-enter the demised premises, or any part thereof, and to expel, remove and put out the Lessee and every person occupying the same, using such force as may be necessary in so doing, and to repossess the said premises, and to enjoy the same as in its first and former estate. Lessee agrees that notice of default hereinbefore provided may be given by delivering a written copy thereof to any officer or agent of Lessee on the premises, or by mailing the same

registered mail, postage prepaid, to the last known address of Lessee.

13. If Lessee shall abandon or vacate said premises the same may be relet by Lessor (but no obligation is hereby imposed upon Lessor to relet) at such time and upon such terms as it may see fit; and if a sufficient sum shall not be thus realized monthly after paying the expenses of such re-letting and collecting, to satisfy the rent hereby reserved, then Lessee agrees to satisfy and pay all deficiencies during each month of the period of this lease remaining after the premises have been so abandoned or vacated.

14. It is agreed that in the event the demised premises should be rendered untenantable by fire or any other casualty Lessor may at its option, within a reasonable time, either terminate this lease or elect to repair the premises within ninety (90) days after the happening of such
227 fire or other casualty. In the event of termination by Lessor the Lessee shall not be liable for rental from and after the date of such fire. If the Lessor elects to rebuild, the Lessee's rental shall be abated for the period in which the demised premises are untenantable; provided, however, that if Lessor upon making such election fails to restore said premises within ninety (90) days after such fire or casualty the term hereby created shall cease and terminate.

15. Lessee shall not be required to pay any part of any general taxes or special assessments levied and assessed upon the demised premises. Lessee agrees to pay all water, rents, gas and electric bills charged on said demised premises for and during the term of this lease.

16. Lessee will pay and discharge all reasonable costs, attorneys' fees and expenses that may be incurred by Lessor in enforcing the covenants and agreements of this lease, and all of said covenants and agreements shall be binding upon, apply and inure to the respective heirs, executors, successors, administrators and assigns of the parties to this lease.

17. Lessee also agrees that it will take out and keep in force during the term of this lease public liability insurance in the amount of not less than $50,000 in respect of injuries to any one person, and in the amount of not less than $100,000 in respect of any one accident or disaster, all in good and responsible companies satisfactory to the Lessor. All policies for such insurance shall be for the protection of both the Lessor and the Lessee, as their respective interests may appear, for any and all claims or loss or
228 damage to any person or persons in connection with

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the demised premises. The policies of such insurance or certificates of insurance, and proof of payment of all premiums due thereon shall be lodged with the Lessor.

18. Lessee shall have the option of renewing this lease for a period of one year following the expiration of the term hereof, which option shall be exercisable by Lessee by giving notice in writing to Lessor by registered mail at least sixty days prior to the expiration of said term.

19. It is understood that the demised premises are now occupied by Roosevelt Cartage Company. Lessor agrees to use his best efforts and at his own expense to cause said Roosevelt Cartage Company to vacate the premises prior to October 1, 1945, or as soon thereafter as possible, but in the event said Roosevelt Cartage Company should hold over after October 1, 1945, notwithstanding Lessor's best efforts to cause said company to vacate on or before that date, Lessor shall not be liable in damages to Lessee for any delay in placing Lessee in possession of the demised premises.

20. All notices required to be given under this lease shall be in writing. Notices directed to Lessee may be delivered to any officer or registered agent of Lessee or by registered mail to Lessee at 3201 South Iron Street, Chicago, Illinois. Notices directed to Lessor may be delivered to Lessor in person or by registered mail to his office at 600 South Michigan Avenue, Chicago, Illinois, or
229 to such other address as Lessor may hereafter designate in writing.

In Testimony Whereof, the party of the first part has set his hand and seal hereto and the said Watson Bros. Transportation Co., Inc., a corporation, has hereunto caused its corporate seal to be affixed and these presents to be signed by its President and attested by its Secretary the day and year first above written.

Charles H. Morse, Jr., (Seal)
Lessor.

Witnessed By:
Samuel W. Witwer, Jr.

Watson Bros. Transportation Co.,
Inc., a Nebraska corporation,
Lessee,

By Fay V. Watson,
President.

Attest:
Wm. M. Wolfe,
Ass't Secretary Treasurer.

230 DEFENDANT'S EXHIBIT 2.

(Letterhead of Gallagher, Rinaker, Wilkinson & Hall, 231 South LaSalle Street, Chicago 4.)

May 28, 1946.

Mr. Fay Watson
President
Watson Bros. Transportation Co. Inc.
802 South 14th St.
Omaha, Nebraska

Dear Mr. Watson:

As attorneys for Mr. Charles H. Morse, Jr., and pursuant to his instructions, we hereby give you notice of a written contract made and entered into May 27, 1946 by and between Mr. Morse, as Seller, and Central States Co-operatives, Inc., a corporation, as Buyer, for the sale of the motor truck terminal property, which your company now occupies as tenant under lease dated July 31, 1945. Said real estate sale contract is conditional in but one respect, namely the exercise by your company, within a period of ten days from the receipt of this notice, of your option to purchase the property on the same terms and conditions and for the same consideration as are set forth in said contract. The option in question is granted to your company by paragraph 2 of lease dated July 31, 1945.

For your information, the contract between Mr. Morse and Central States Cooperatives, Inc. provides that the purchase price shall be $100,000.00, payable in cash through an escrow to be established at the Chicago Title and Trust Company immediately after it is determined that your company does not elect to exercise its option. $10,000.00 has already been paid by the Buyer as earnest money and the remaining $90,000.00 is to be deposited at the Chicago Title and Trust Company in said escrow account within thirty days following the execution of the escrow agreement. The conveyance of the premises is to be made by general Warranty Deed covering not only the real estate occupied by your company under its lease dated July 31, 1945 but also certain easements affording a means of egress and ingress to the premises via the intersection of West

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34th and Iron Streets, and also via West 33rd Street
231 (in the event said street is subsequently opened as a public or private street so as to afford permanent means of egress and ingress). Under the contract, Mr. Morse agrees to furnish a title guaranty policy of Chicago Title and Trust Company guaranteeing title to the premises and easements in the amount of $100,000.00, subject only to the customary objections appearing in such policies and to several other objections not deemed to affect the marketability of the title. Mrs. Charles H. Morse, Jr. has joined in the execution of the contract.

A conformed copy of the real estate purchase contract between Mr. Morse and Central States Cooperatives, Inc. is enclosed herewith for your examination. Kindly return this copy to us after you have had an opportunity to examine it. In the event your company does not elect to purchase the property, pursuant to its adoption on the terms and conditions and for the consideration mentioned in the contract, then upon the execution of the escrow agreement which will take place approximately twelve days hence, we will, on behalf of Mr. Morse give you further notice of the termination of your lease, pursuant to the power reserved in the lessor under paragraph 2 thereof.

We will be very glad to hear from you at your earliest convenience regarding your decision. In the event you do not advise us in writing within ten days from the receipt of this letter of your election to purchase the premises, then your option will terminate and Mr. Morse will proceed with the sale of the property to Central States Cooperatives, Inc.

Yours very truly,
Gallagher, Rinaker, Wilkinson & Hall,
By: Samuel W. Witwer, Jr.

sww/kg

(In the lower lefthand margin appeared in writing: Central States Cooperatives, Inc., 1533 So. Peoria St., Ph. Cheaspeake 4334.)

232 DEFENDANT'S EXHIBIT 3.

(Letterhead of Brenner and McBride, 100 North La Salle Street, Chicago 2.)

June 7, 1946

Watson Bros. Transportation Co., Inc.,
3201 S. Iron Street,
Chicago, Illinois.

Gentlemen:

We wish to advise that as attorneys for Central States Cooperatives, Inc., we have been requested to draft a lease to become effective upon Central States Cooperative, Inc. acquiring the terminal property commonly described as 3201 S. Iron Street, Chicago, Illinois, from Central States Cooperative, Inc., as lessor and Watson Bros. Transportation Co., Inc. as lessee, for the term ending December 31, 1946, with an option to lessee on sixty days' notice of renewal for one year to December 31, 1947, giving to Watson Bros. the right to use and occupy the dock space (not including the garage and office) for use as a truck terminal, at a monthly rental of $450.00 a month, payable on the 1st of each month, to and including December, 1946 and for $650.00 a month during the option period to and including the month of December, 1947, replacing the present lease to Watson Bros. Transportation Co., Inc. as lessee from Charles H. Morse Jr. as lessor.

As soon as Central States Cooperative, Inc. acquires title to the property and not later than July 15, 1946, if Central States Cooperative, Inc. completes the acquisition of the property by that time, Central States Cooperative, Inc. will occupy the garage and office space on said premises except the dock space being rented to Watson Bros. Transportation Co., Inc. for a terminal.

The remaining terms and conditions will be such as may be mutually agreed upon.

Yours very truly,
Thomas G. McBride.

TGMcB:D

Approved:
Central States Cooperatives, Inc.,
By Laurie L. Lehtin.

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233 DEFENDANT'S EXHIBIT 4.

(Letterhead of Central States Cooperatives, Inc.
Chicago 8, Illinois.)

October 2, 1946

Watson Bros. Transportation Co.
802 South 14 Street
Omaha, Nebraska

Dear Sirs:

We return herewith your check #7144 for $850.00. Your lease expired September 30.

Yours truly,
Central States Cooperatives, Inc.
Laurie L. Lehtin,
General Manager.

LLL:bf

(Pencil notation) Check returned to B. A. Lawler 10/3/46

234 DEFENDANT'S EXHIBIT 4-A.

(Envelope)

Central States Cooperatives, Inc.
1535 South Peoria Street
Chicago 8, Illinois

Watson Bros. Transportation Co.
802 South 14 Street
Omaha 2, Nebraska

(Stamps) Return Receipt Requested. Register No. 588714.

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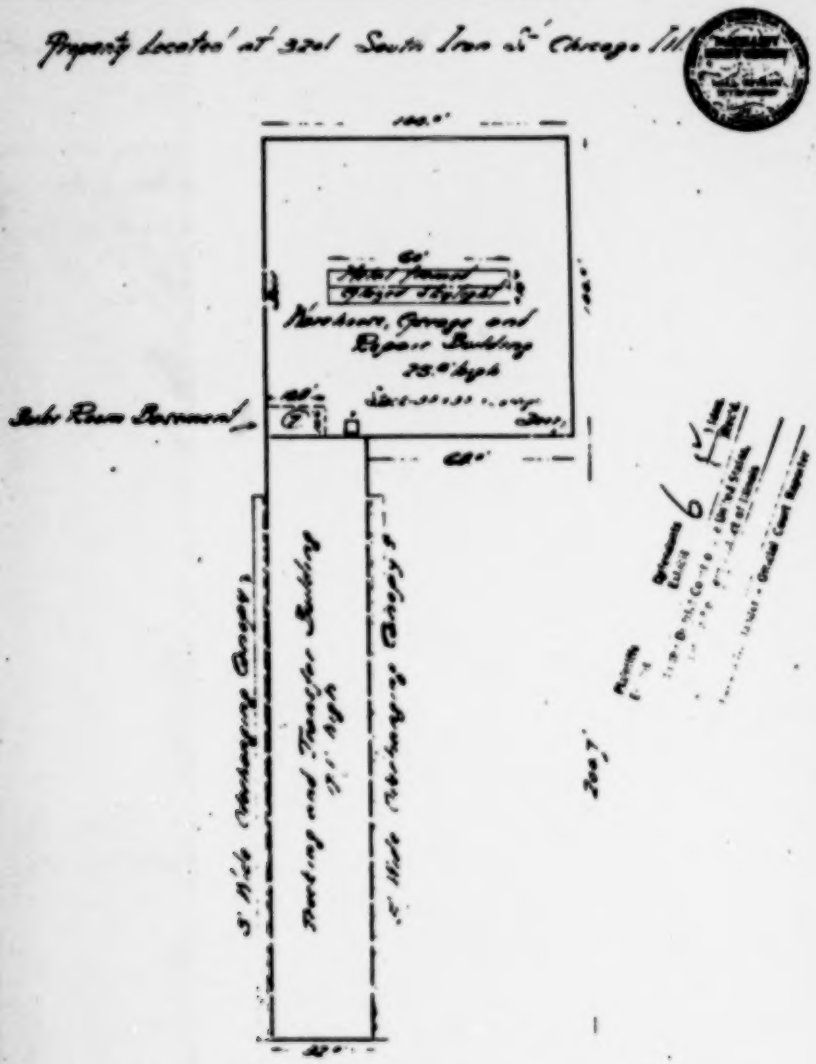
DEFENDANT'S EXHIBIT NO. 5.

Defendant's Exhibit 5
In the District Court of the United States, for the Northern District of Illinois
Edward Neelander - Official Court Reporter

3201 South Iron Street.

Rear Elevation.


Property located at 3201 South Iron St. Chicago Ill
Showroom, Garage and Repair Building
75.0" by 45
Boiler Room Basement
Iron
Alley

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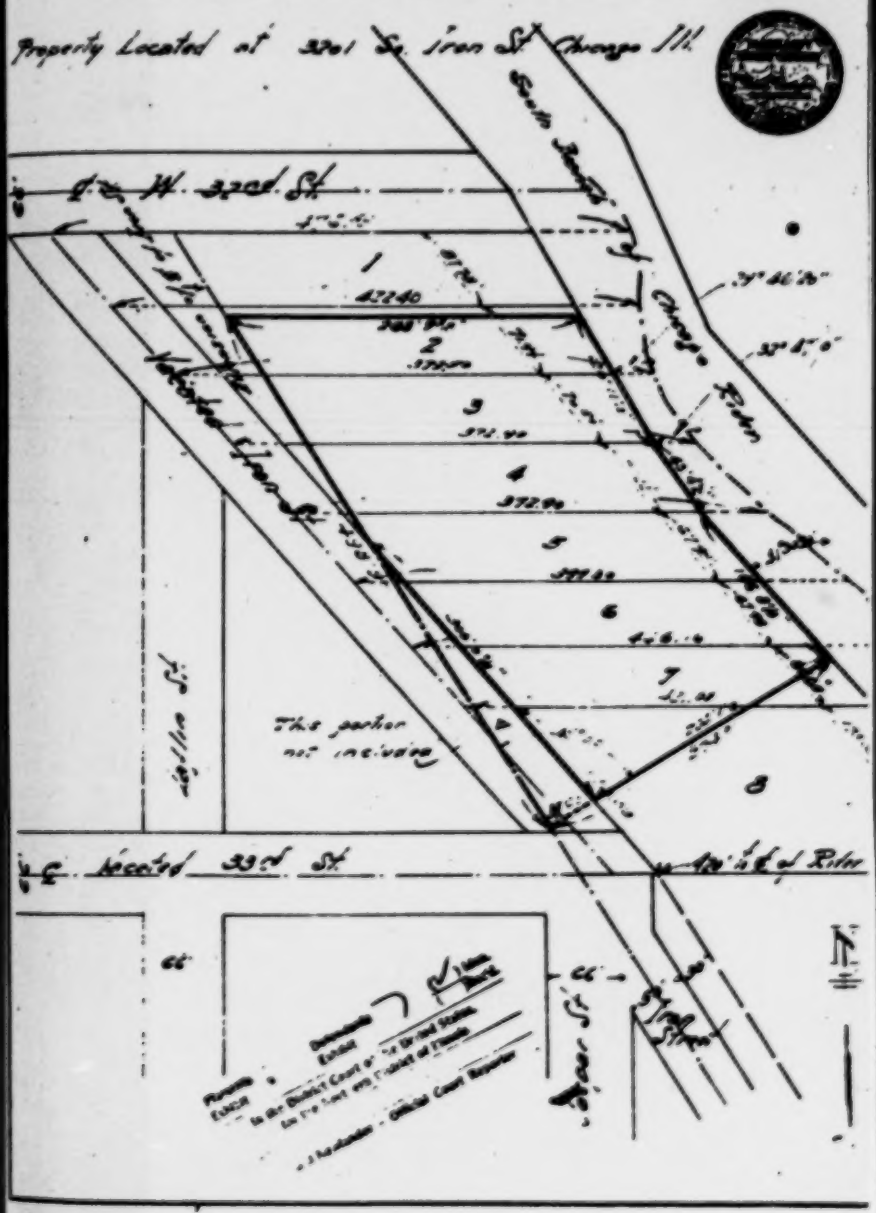
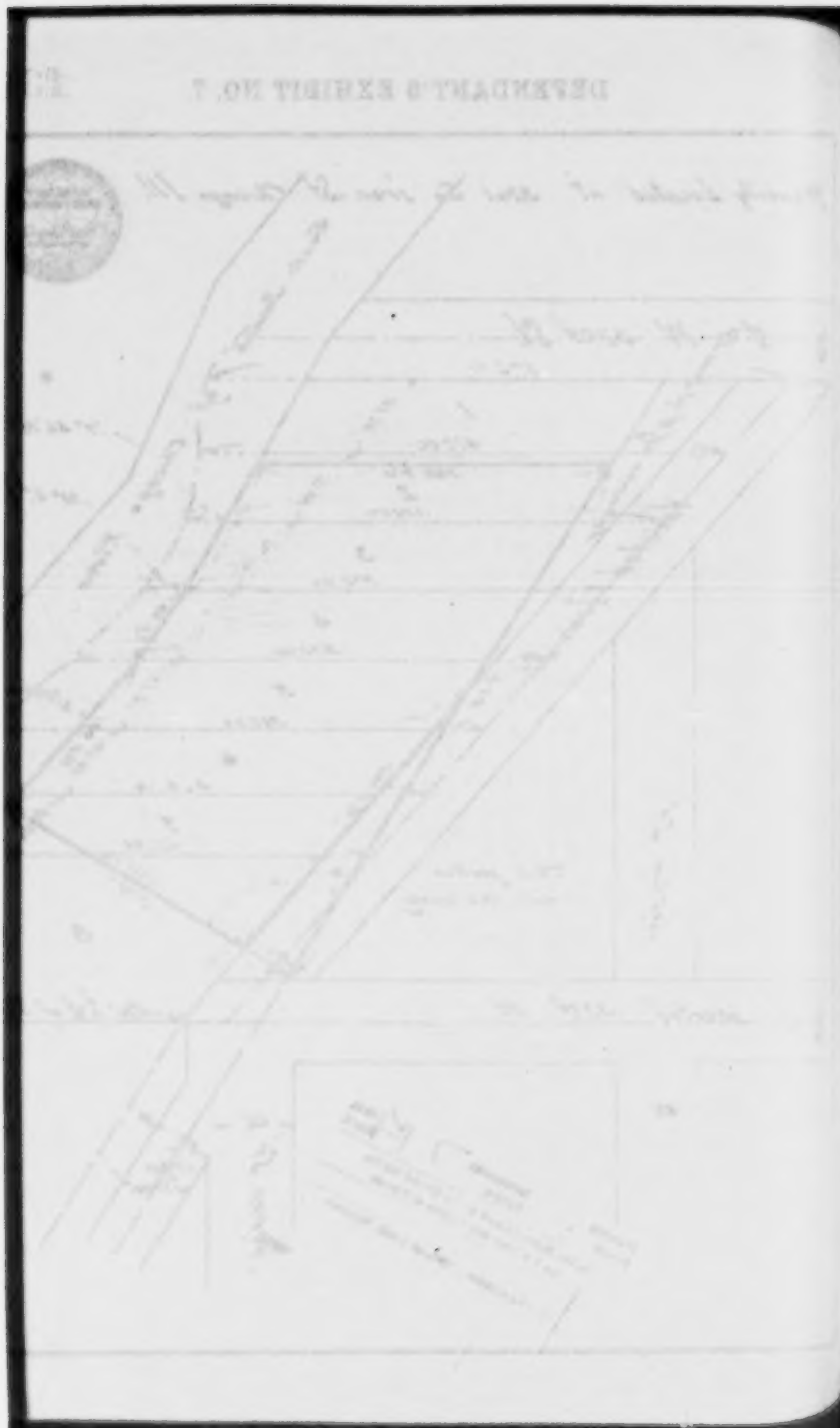

Property Located at 3201 S. Iron St Chicago Ill.
South Branch
Chicago River
Halsted
Iron St
This portion not included
Iron St
Plaintiff's Exhibit
Defendant's Exhibit
In the District Court of the United States
In the East. Div. District of Illinois
J. Anderson - Official Court Reporter



239 DEFENDANT'S EXHIBIT 8.

(Letterhead of Brenner and McBride, Lawyers
Chicago 2.)

June 25, 1946

Watson Bros. Transportation Co., Inc.,
802 South 14th Street,
Omaha, Nebraska.

Gentlemen:

On June 7th we addressed a letter to you, proposing the making of a lease and enclosing a draft of a lease from Central States Cooperatives, Inc., to your company for the dock space on the property at 3201 South Iron Street, Chicago, Illinois. These we delivered to Mr. William Wolf, your attorney, upon the request of Mr. Richter of Seay & Thomas, because we were given to understand that your company was ready to make such a lease. Mr. Wolf stated that he would write or call me within a few days.

Mr. Richter wrote to Mr. Wolf on June 17th requesting a response. In view of the fact that we have not heard from you to this date we wish to advise that we feel obliged to and do withdraw the offer and proposal of such lease. This is in order that there will be no question as to our being free to negotiate with other persons for the leasing by Central States Cooperatives, Inc. of this dock space. We wish to advise that Central States Cooperatives, Inc. is not unwilling to enter into a lease with your company but if this is to be done we should have your acceptance of our proposal within five days of your receipt of this letter.

If you are interested in continuing the premises, we suggest that you act in the matter promptly.

Yours very truly,
Thomas G. McBride.

TGMcB:D

240 DEFENDANT'S EXHIBIT 9.

(Letterhead of Seay & Thomas, Chicago.)

June 17, 1946.

Mr. William Wolf,
Watson Bros. Transportation Co., Inc.,
802 S. 14th Street,
Omaha, Nebraska.

Dear Sir:

When you were in Chicago last week, you received a lease from Mr. T. G. McBride as attorney for Central States Co-operative Inc. on the dock space existing on the property at 3201 S. Iron St., Chicago, Ill. In our discussions we assumed the terms of the lease to be satisfactory and that the lease would be executed and returned.

As you know, we have other prospective tenants who would pay a rental considerably in excess of the one called for in the lease offered you although, they would not be in a position to allow entry into the garage on the date requested. If you feel the terms to be unsatisfactory we would appreciate your informing us to enable our client to negotiate with other tenants.

If we do not hear from you during the week, we will consider the matter in the above light and open negotiations with the truck lines.

Very truly yours,
Seay & Thomas,
Edw. L. Richter.

241 And afterwards on, to wit, the 23rd day of December, 1946, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion for Directed Verdict in words and figures following, to wit:

242 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

PLAINTIFF'S MOTION FOR DIRECTED VERDICT.

Now comes the plaintiff in this cause at the close of the defendant's evidence and moves the court to instruct the jury to find the defendant, Watson Bros. Transportation Company, Inc., guilty of unlawfully withholding from the plaintiff, Central States Cooperatives, Inc., the possession of the premises described in the plaintiff's amended complaint herein, and that the right to the possession of the said premises is in the plaintiff, and tenders herewith its instruction to that effect.

As grounds for the said motion the plaintiff shows as follows:

1. There is no competent evidence in the record to justify submitting the case to the jury.
2. The evidence in support of the defendant's affirmative defense is insufficient as a matter of law to support the case of the defendant.
3. The defendant has not sustained its burden of proof on its affirmative defense by any competent or sufficient evidence.
4. The affirmative defense sought to be made by the defendant is upon oral agreement which is subject to the objection of the Statute of Frauds.
5. The defendant has not invoked the equitable jurisdiction of the Court nor proved such part performance as to relieve the defendant of the objection of the Statute of Frauds.
6. The defendant has not shown that an agreement
243 of oral lease entered into by any officer or agent of the plaintiff having authority or competent to bind the plaintiff to such an oral lease.

Brenner & McBride,
Attorneys for the Plaintiff.

Brenner & McBride,
Attorneys for Plaintiff,
100 N. LaSalle St.,
Chicago, Randolph 4477.

244 And on the same day, on, to wit, the 23rd day of December, 1946, there was filed in the Clerk's office of said Court certain Instructions to the Jury in words and figures following, to wit:

245 The Court instructs the jury that the evidence offered herein is insufficient to support the defendant's defense. It is therefore your duty to return a verdict finding the defendant, Watson Bros. Transportation Company, Inc., guilty of unlawfully withholding from the plaintiff, Central States Cooperatives, Inc., the possession of the premises described in the plaintiff's amended complaint herein, and that the right to the possession of the said premises is in the plaintiff.

246 And on the same day, on, to wit, the 23rd day of December, 1946, there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

247 THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption——46-C-1886) * *

VERDICT.

We, the jury, find the defendant, Watson Bros. Transportation Co., Inc., guilty of unlawfully withholding from the plaintiff, Central States Cooperatives, Inc., the possession of the premises described in the plaintiff's amended complaint herein, and that the right to the possession of the said premises is in the plaintiff.

P. M. Irons, Jr.,
Sidney A. Teller,
Marjorie L. Campbell,
Carrie A. Harris,
Helen B. Patton,
Abbie T. Young,
Harry Ceedar,
Lillian I. Browder,
Clara M. Armstead,
Marie Callaway,
Stacey B. Barton,
Paul M. McClintock.

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248 And on the same day, to wit, on the 23rd day of December, 1946, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

249 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

This cause this day being called for trial come the parties to this suit by their attorneys, respectively, and the issues being joined

It Is Ordered that a Jury come Whereupon come a Jury of twelve (12) good and lawful men and women, to wit:

Marjorie Campbell
Harry L. Ceedar
Mrs. Marie C. Callaway
Lillian I. Browder
Sidney A. Teller
Stacey B. Barton
Paul M. McClintock
Mrs. Helen B. Patton
Mrs. Abbie Young
Paul M. Irons, Jr.
Mrs. Clara M. Armstead
Mrs. Carrie A. Harris

who are duly selected, empaneled and sworn well and truly to try the issues joined herein and a true verdict to render according to law and the evidence and the trial of this cause proceeds and (the burden of proof being on the defendant) the said trial proceeds with the hearing of the defendant's evidence and at the conclusions of all the evidence adduced by the defendant the plaintiff by counsel enters herein its motion for a directed verdict which motion is sustained and thereupon the Jury by direction of the Court render their verdict in open Court and say:

"We, the jury, find the defendant, Watson Bros. Transportation Co., Inc., guilty of unlawfully withholding from the plaintiff, Central States Cooperatives, Inc., the possession of the premises described in the plaintiff's amended

complaint herein, and that the right to the possession of the said premises is in the plaintiff." Therefore

It Is Considered, Ordered and Adjudged by the Court that the plaintiff, Central States Cooperatives, Inc., a District of Columbia corporation, do have restitution from the defendant, Watson Bros. Transportation Company, Inc., a Nebraska corporation, of the real estate and premises situated in the City of Chicago, County of Cook, and State of Illinois, described as follows, to wit:

250 That part of the North Half (N½) of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street, as it exists South of vacated West 33rd Street, which is Fifty (50) feet wide, extended Northwesterly with North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to Westerly dock line of South fork of South branch of Chicago River, as occupied; thence North Forty-one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One hundred sixty-six (166) feet Eight and one-eighth (8 1/8) inches; thence North Thirty-two (32) degrees, Forty-seven (47) minutes West, Sixty-three (63) feet Four and one-half (4½) inches; thence North Twenty-nine (29) degrees, Forty-six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and one-half (11½) inches more or less along said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decreet's Subdivision of Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Alice Lynch's Subdivision of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian; thence west along said South line extended Two Hundred Eighty-eight (288) feet Nine and Five-eighths (9 5/8) inches more or less to intersection of said line with center line of vacated Iron Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of vacated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred Ninety-eight (498) feet and

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Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet, more or less;
and that the said plaintiff do have and recover of and from the said defendant its costs and charges in this behalf expended and on motion of the defendant

It Is Further Ordered that supersedeas bond on appeal be and it is hereby fixed at the sum of Twenty Thousand Dollars ($20,000.00) and

It Is Further Ordered that leave be and it is hereby given to the parties to withdraw the original exhibits and substitute photostatic copies thereof.

251 And afterwards on, to wit, the 24th day of December, 1946 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

252 In the District Court of United States

For the Northern District of Illinois,

Eastern Division.

Central States Cooperatives, Inc., A District of Columbia Corporation,
Plaintiff-Appellee,
vs.
Watson Bros. Transportation Co., Inc., A Nebraska Corporation,
Defendant-Appellant.
} No. 46 C 1886.

NOTICE OF APPEAL.

Notice is hereby given that Watson Bros. Transportation Co., Inc., a Nebraska Corporation, Defendant-Appellant, by its duly authorized attorneys, Sherwin & Sherwin, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from:

1. The order entered in the above entitled cause on December 10, 1946 overruling the defendant's Motion to Strike the plaintiff's amended complaint;

2. Judgment order entered in the above entitled cause on the 23rd day of December, 1946 on the verdict of the jury finding Watson Bros. Transportation Co., Inc., a corporation, guilty of unlawfully withholding from the Central States Cooperatives, Inc., a corporation, the possession of the premises described in the Amended Complaint filed herein, and the right to the possession of the said premises is in the said Central States Cooperatives, Inc.

Dated this 24th day of December, 1946.

Sherwin & Sherwin,
By Theodore R. Sherwin,
Attorneys for Defendant-Appellant.

Sherwin & Sherwin,
209 South LaSalle St.,
Chicago 4, Illinois,
Central 2010,
Attorneys for Defendant-Appellant.

(Attached hereto is the following certificate.)

253 In the District Court of the United States

For the Northern District of Illinois,

Eastern Division.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 24th day of December, 1946, in accordance with Rule 73(b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Brenner and McBride,
100 N. LaSalle St.,
Chicago 2, Ill.

Roy H. Johnson,
Clerk.

(Seal)

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254 And afterwards on, to wit, the 20th day of January, 1947, came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points, in words and figures following, to wit:

255 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * * .

STATEMENT OF POINTS.

Now comes Watson Bros. Transportation Co., Inc., a Nebraska corporation, Defendant-Appellant, by Sherwin & Sherwin, its attorneys, and shows that it intends to rely upon the following points in its appeal to the Circuit Court of Appeals for the Seventh Circuit from the orders entered in the above entitled cause on December 10, 1946, overruling the defendant's motion to strike the plaintiff's amended complaint and the judgment order entered in the above entitled cause on December 23, 1946;

1. The District Court erred in overruling the motion of Watson Bros. Transportation Co., Inc., to strike the plaintiff's amended complaint, which order was entered on the motion of the plaintiff to strike the motion of the defendant to strike the amended complaint, and the action of the Court did not afford the defendant-appellant, Watson Bros. Transportation Co., Inc., to present its briefs and arguments as required by Rule 7 of the Rules of the District Court, said order having been entered summarily on the motion of the plaintiff-appellee to strike the aforesaid

256 motion of the defendant-appellant.

2. The District Court erred in overruling the defendant's motion to strike the amended complaint of the plaintiff, since said motion to strike was well founded in law and should have been sustained.

3. The District Court erred in sustaining and allowing the plaintiff's motion for a directed verdict.

4. The District Court erred in its instructions to the jury in directing a verdict in favor of the plaintiff at the close of the evidence only on the part of the defendant.

5. The Court erred in directing the jury to find its verdict in favor of the plaintiff at the close of the evidence on the part of the defendant, the evidence of the defendant being the only evidence offered, and defendant, therefore, being entitled to all findings, inferences and construction of the evidence offered by it; the defendant's evidence was

substantial and sufficient to sustain the position of the defendant that it was lawfully in possession under the terms of an oral leasing agreement which it had partly performed, which was therefore taken out of the operation of the Statute of Frauds.

6. The oral agreement relied upon by the defendant to sustain its possession of the premises in question was not within the Statute of Frauds by reason of the part performance of said agreement on the part of the defendant-appellant herein.

7. There was a sufficient showing of competent evidence on the part of the defendant that the person with whom the defendant made its oral leasing agreement was a duly licensed agent of the plaintiff.

8. It was error for the District Court to enter findings of fact and conclusions of law in a jury case in which there has been a motion for a directed verdict at the close of the evidence on the part of one of the parties.

257 9. The District Court erred in entering its judgment order on the verdict of the jury finding Watson Bros. Transportation Co., Inc., a corporation, guilty of unlawfully withholding from Central States Cooperatives, Inc., plaintiff-appellee, possession of the premises described in the amended complaint filed in this proceedings or finding that the right to the possession of said premises was in the said Central States Cooperatives, Inc., since there was sufficient and substantial evidence offered on the part of the defendant-appellee whereby it was shown that the defendant-appellee was lawfully in possession of the said premises, and that the said cause should therefore have gone to the jury on the evidence offered by the defendant-appellant as a question of fact.

Sherwin & Sherwin,
By Theodore R. Sherwin,
Attorneys for the Defendant-Appellant, Watson Bros. Transportation Company, Inc.

Sherwin & Sherwin,
209 South LaSalle St.,
Central 2010,
Attorneys for Defendant-Appellant.

Received a copy of the foregoing Statement of Points this 30th day of January, 1947.

Brenner & McBride,
Attorneys for the Plaintiff-Appellee.

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258 And on the same day, to wit, on the 24th day of December, 1946, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

259 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

ORDER.

This cause coming on to be heard on the motion of Watson Bros. Transportation Co., Inc., a Nebraska Corporation, Defendant-Appellant herein, for the approval of the supersedeas bond and for an order of supersedeas staying the execution of the judgment order of this Court of December 23, 1946, and the Court finding that the said bond is in the sum of Twenty Thousand Dollars ($20,000.00) with surety as required by the Court;

Now, Therefore, this Court having examined said bond and being satisfied with the qualifications of the said surety, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the supersedeas bond be and it is hereby approved; and it is Further Ordered that the Notice of Appeal herein filed be, and it is hereby made a supersedeas to be obeyed as such by all concerned.

Enter:

Elwyn R. Shaw,
Judge.

December 24, 1946.

260 And on the same day, to wit, the 24th day of December, 1946 there was filed in the Clerk's office of said Court a certain Supersedeas Bond in words and figures following, to wit:

261 **Supersedeas Bond.**

Know All Men By These Presents, that we, Watson Bros. Transportation Co., Inc., a Nebraska Corporation, principal, and National Surety Corporation, a corporation, as surety, are held and firmly bound unto Central States Cooperatives, Inc., a corporation of the District of Columbia, in the penal sum of Twenty Thousand Dollars ($20,000.00) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, successors and assigns, jointly and severally and firmly by these presents.

Witness our hands and seals this 24th day of December, A. D. 1946.

The Condition Of The Above Obligation Is Such, that Whereas, said Central States Cooperatives, Inc., did on the 23rd day of December, A. D. 1946, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in an action of forcible entry and detainer captioned Central States Cooperatives, Inc., a District of Columbia Corporation, *vs.* Watson Bros. Transportation Co., Inc., a Nebraska Corporation, No. 46 C 1886 of said Court, recover a judgment against the above bounded Watson Bros. Transportation Co., Inc., a Corporation, for the restitution of certain premises described in the Amended Complaint, to-wit:

262 That part of the North Half (N½) of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street as it exists South of vacated West 33rd Street, which is fifty (50) feet wide, extended Northwesterly with North Line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to Westerly dock line of South fork of South

branch of Chicago River, as occupied; thence North Forty-one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One hundred sixty-six (166) feet Eight and one-eighth (8⅛) inches; thence North thirty-two degrees, forty-seven (47) minutes West, Sixty-three (63) feet four and one-half (4½) minutes West, thence North Twenty-nine (29) degrees, Forty-six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and one-half (11½) inches more or less along the said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decreet's Subdivision of Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Alice Lynch's Subdivision of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian, thence West along the said South line extended Two Hundred Eighty-eight (288) feet Nine and Five-eighths (9⅝) inches more or less to intersection of said line with center line of vacated Iron Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of vacated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred Ninety-eight (498) feet and Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet, more or less, situate in the City of Chicago, County of Cook and State of Illinois.

together with all costs of suit, from which judgment of said Court said Watson Bros. Transportation Co., Inc., has taken an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

Now Therefore, if the said Watson Bros. Transportation Co., Inc., shall prosecute said appeal with effect and moreover pay all rent now due or that may become due before the final determination of this suit, and also all damages and losses which the said Central States
263 Cooperatives, Inc., may sustain by reason of the withholding of the premises in controversy and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs accrued or that may accrue in case the judgment from which the appeal is taken is affirmed or

said appeal dismissed, then the above bounded obligation to be void, otherwise to remain in full force and effect.

Watson Bros. Transportation Co., Inc., A Corporation,
By Wm. M. Wolfe, (Seal)
Vice-President.

National Surety Corporation, a corporation,
By George P. Wingo, (Seal)
Atty. in Fact.

Taken and approved by me this 24th day of ..... A. D. 1946.

Elwyn R. Shaw,
One of the Judges of the United States District Court.

264 Know All Men By These Presents, that National Surety Corporation, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N.Y., hath made, constituted and appointed, and does by these presents make, constitute and appoint George P. Wingo, of Chicago, and State of Illinois its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, acknowledge and deliver any and all bonds, recognizances, contracts, agreements of indemnity and other conditional or obligatory undertakings, and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises. Said appointment is made under and by authority of the following provisions of the By-laws of National Surety Corporation:

"Article XII. Resident Officers And Attorneys-in-Fact.

"Section 1.—The Chairman, President or any Vice-President may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the corporation and the Chairman, President, or any Vice-President, the Board of Directors or the Executive Committee

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may at any time suspend or revoke the powers and authority given to any such Resident Vice-President, Resident Assistant Secretary and Attorney-in-Fact, and also remove them from office. (Adopted April 29, 1933. Applies to all powers of attorney executed prior to May 25, 1933).

"Section 1.—The President, Executive Vice-President or any Vice-President may, from time to time, appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Corporation and the President, Executive Vice-President or any Vice-President, the Board of Directors or the Executive and Finance Committee may at any time suspend or revoke the powers and authority given to any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact, and also remove any of them from office. (As amended May 25, 1933. Applies to all powers of attorney executed prior to April 27, 1943).

"Section 1.—Appointment.—The President, Executive Vice President or any Vice President may, from time to time, appoint Resident Vice Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Corporation. (As amended April 27, 1943. Applies to all powers of attorney executed on or after that date).

"Section 4.—Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute, acknowledge and deliver for and in the name and on behalf of the Corporation any and all bonds, recognizances, contracts of indemnity and other conditioned or obligatory undertakings, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Corporation as if signed by the Chairman or the President and sealed and attested by the Secretary. (Adopted April 29, 1933. Applies to all powers of attorney executed prior to May 25, 1933).

"Section 4.—Attorneys-in-Fact.—Attorneys-in-Fact may be given full power and authority to execute, acknowledge and deliver for and in the name and on behalf of the Corporation any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the corporation as if signed by the President and sealed and attested by

the Secretary. (As amended May 25, 1933. Applies to all powers of attorney executed prior to July 30, 1935).

"Section 4.—Attorneys-in-Fact.—Attorneys-in-Fact may be given full power and authority, for and in the name and on behalf of the corporation, to execute, acknowledge and deliver, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings, and any and all notices and documents canceling or terminating the corporation's liability thereunder, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary. (As amended July 30, 1935. Applies to all powers of attorney executed prior to April 27, 1943).

"Section 4.—Attorneys-in-Fact.—Attorneys-in-Fact may be given full power and authority, for and in the name and on behalf of the Corporation, to execute, acknowledge and deliver, any and all bonds, recognizances, contracts, agreements of indemnity and other conditional or obligatory undertakings, and any and all notices and documents canceling or terminating the Corporation's liability thereunder, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the Corporation as if signed by the President and sealed and attested by the Secretary. (As amended April 27, 1943. Applies to all powers of attorney executed on or after that date).

"Section 7. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to a copy of the By-laws of the Corporation or any Article or Section thereof. (Adopted April 29, 1933. Applies to all powers of attorney executed prior to May 25, 1933).

"Section 7.—Attorneys-in-Fact.—Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to copies of the By-Laws of the corporation or any Article or Section thereof. (As amended May 25, 1933. Applies to all powers of attorney executed prior to April 27, 1943).

"Section 7.—Attorneys-in-Fact—Verifications. — Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts, agreements of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to copies of the By-laws of the Corporation or any Article or Section thereof. (As amended April 27, 1943. Applies to all powers of attorney executed prior to June 27, 1944).

"Section 7.—Attorneys-in-Fact—Verifications—Certifications.—Attorneys-in-Fact are hereby authorized to verify, by affidavit or otherwise, the authority to execute bonds, recognizances, contracts, agreements of indemnity, and other conditional or obligatory undertakings; and to certify, by affidavit or otherwise, as to the inspection or examination of assets of the estates, where the fiduciary responsible for such assets is bonded by the Corporation; and they are also authorized and empowered to certify to copies of the By-laws of the Corporation or any Article or Section thereof. (As amended June 27, 1944. Applies to all powers of attorney executed on or after that date.)

In Witness Whereof, National Surety Corporation has caused these presents to be signed by its Vice President, attested by its Assistant Secretary, and its corporate seal to be hereto affixed this 27th day of February A. D., 1946.

National Surety Corporation,
By S. G. Drake,
Vice President.

(Seal)

Attest:
A. N. MacDougall,
Assistant Secretary.

265 State of Illinois, } ss:
County of Cook, }

I, R. Nalikowsky, a Notary Public of Cook County, in the State of Illinois, do hereby certify that George P. Wingo Attorney in fact, of National Surety Corporation, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of National Surety Corporation for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Chicago, in said County, this 24th day of December, A. D. 1946.

R. Nalikowsky,
Notary Public.

(Notarial Seal)

My Commission Expires January 24, 1949.

266 National Surety Corporation,
New York.
Vincent Culen, President.

General Power Of Attorney

—To—

.....

On .....

Date ..... 194.....

State of New York, } ss.
County of New York, }

On this 27th day of February A. D., 1946, before me personally came S. G. Drake, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is Vice President of National Surety Corporation, the Corporation described in and which executed the above instrument; that he knows the

seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order. And said S. G. Drake further said that he is acquainted with A. N. MacDougall and knows him to be an Assistant Secretary of said Corporation; and that he executed the above instrument.

Elizabeth C. King,
Notary Public.

(Notarial Seal)

State of New York, }
County of New York. } ss.

I, A. N. MacDougall, Assistant Secretary and Attorney in-Fact of National Surety Corporation, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney (including applicable By-law sections), executed by said National Surety Corporation, which is still in force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Corporation, at the City of New York, N. Y., this 24th day of December A. D., 1946.

A. N. MacDougall,
Assistant Secretary and Attorney-in-Fact.

267 And afterwards on, to wit, the 29th day of January, 1947 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings before Hon. Elwyn R. Shaw, Judge, on January 8 and 10, 1947 in words and figures following, to wit:

269 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his courtroom, United States Court House, Chicago, Illinois, on January 8th and 10th, 1947.

Present:

Messrs. Brenner & McBride, by Mr. Thomas Garth McBride, appeared on behalf of plaintiff;

Messrs. Sherwin & Sherwin, by Mr. Theodore R. Sherwin, appeared on behalf of defendant.

Reported by Edward Newlander, Official Court Reporter.

270 (Proceedings on January 8, 1947:)

By the Clerk: 46 C 1886, Central States Cooperatives *vs.* Watson Bros. Transportation Company. Motion to consider the filing of findings of fact and conclusions of law.

Mr. McBride: In considering this matter, it seems to me, from a reading of the rules, the case being tried before a jury, Rule 52 with reference to findings of fact and conclusions of law, does not apply to this case. That was the opinion I formed from a reading of the law.

I have made a check into the authorities, cases decided under this rule, and I think they are quite clear that findings of fact and conclusions of law where a motion for directed verdict is sustained are not appropriate. I should like to discuss this with the court if the court thinks best.

The Court: I am not familiar with the rule you refer to, but the court made the only findings that were made in this case. I took it away from the jury.

Mr. McBride: Yes.

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The Court: A transcript of the trial and what took place at that time will indicate what I found as a matter of fact.

Mr. McBride: Yes.

271 The Court: My offhand impression would be that having taken it away from the jury it is up to the court to make findings of fact.

Mr. McBride: The rule which applies to this situation I think is Rule 52, which I may read.

The Court: Please.

Mr. McBride: "Rule 52. Findings by the Court.

"(a) Effect. In all actions tried upon the facts without a jury, the court shall state the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * *"

Then there follows a long note of the Advisory Committee of the Supreme Court that adopted the rules, referring to the equity rules from which this was taken, and stating that:

"It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was a conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony."

In the case before us, it was a case tried by the 272 jury—

The Court: No. The case was started with the jury and finished by the court.

Mr. McBride: That is correct. I have checked some authorities under this rule, and while I am not averse to filing propositions of law, or conclusions—I am very happy to do so—there is a question in my mind as to the propriety of the action.

The Court: I think you should prepare the findings of fact and conclusions of law, that the facts were insufficient to justify any other verdict than the one that was required. It cannot hurt to have it in the record, and I would feel I did not do my duty if I did not have such a finding in the record.

You may prepare your findings of fact and conclusions of law as I indicated at the time of the trial.

Mr. Sherwin: Will you fix a time for that so that I may get my—

The Court: Have you the transcript?
Mr. Sherwin: It has been ordered.
The Court: Haven't you the transcript?
Mr. McBride: Not as yet.
Mr. Sherwin: I ordered it, both counsel and myself.
The Court: You should be able to do that within
273 ten days.
Mr. McBride: Yes. I have my notes prepared.
The Court: Present it within ten days.
Mr. Sherwin: Thank you.
Mr. McBride: Very well.

274 (Proceedings on January 10, 1947.)

By the Clerk: 46 C 1886, Central States Cooperatives, Inc., *vs.* Watson Bros. Transportation Company. Findings of fact and conclusions of law.
Mr. McBride: At your Honor's suggestion, I prepared findings of fact and conclusions of law which I have submitted in writing to the court.
The Court: You don't make them at my suggestion. I don't care whether you file them or not. It is your own business.
Mr. Sherwin: We object to all the findings of fact and conclusions because we feel the case should have gone to the jury and should not have been directed, that there was sufficient evidence upon which to submit the case to the jury.
The Court: Your objections then are general objections. Have you any specific objections?
Mr. Sherwin: These were served on me yesterday. They are rather lengthy. There were ten days given in which to file them. If I can have five days to file written objections, I would like to have leave to do that.
The Court: You may have five days. Where is your form of judgment?
Mr. McBride: The form of judgment, I understand, is prepared by the clerk upon that.
275 The Court: Not necessarily in this kind of a case. This is not a money judgment. This is a judgment for possession.
Mr. McBride: Yes.
The Court: I think you had better prepare what you want.

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The Clerk: A judgment was entered precisely as the verdict read.

Mr. McBride: Yes.

The Court: You may have five days to prepare written objections.

Mr. Sherwin: Thank you.

Mr. McBride: There is one other thing I would like to mention to the court. That is, at the time the judgment order was entered there was a suggestion made that these findings of fact and conclusions of law be filed. The rule provides that be done within ten days. But because of Christmas and New Year's holidays intervening, counsel and myself agreed they might be presented when the court returned.

Mr. Sherwin: I am making no objection on the ten-day filing, if that is counsel's point.

The Court: Very well.

Mr. McBride: Very well.

Mr. Sherwin: Thank you.

277 And afterwards, to wit, on the 8th day of January, 1947, being one of the days of the regular December, 1946 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw District Judge, appears the following entry, to wit:

278 In the District Court of the United States.

* * (Caption—46-C-1886) * *

It Is Ordered by the Court that the plaintiff prepare and present within ten (10) days from this date proposed findings of fact and conclusions of law.

279 And afterwards on, to wit, the 10th day of January, 1947 came the Plaintiff-Appellee by its attorneys and filed in the Clerk's office of said Court its certain Notice in words and figures following, to wit:

280 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—46-C-1886) • •

NOTICE.

To: Sherwin & Sherwin, 209 S. La Salle St., Chicago 4, Illinois.

You Will Please Take Notice that on Friday, the 10th day of January, A. D. 1947, at the opening of court in the forenoon or as soon thereafter as counsel may be heard, we shall appear before his Honor, Judge Elwyn R. Shaw, in the courtroom usually occupied by him, in the U. S. Court House, or before such other judge as may be sitting in his place and stead, and shall then and there in pursuance of the order and direction of the court of January 8th, and not upon the motion of the plaintiff, present the findings of fact and conclusions of law in the above entitled cause.

At Which Time And Place you may appear if you so see fit.

Brenner & McBride,
Attorneys for Plaintiff.
100 N. La Salle Street,
Chicago,
Ran. 4477.

State of Illinois, } ss.
County of Cook. }

Thomas G. McBride, being first duly sworn, on oath deposes and says that he served the above notice on the attorneys of record listed above by depositing in the United States Mail, in the mail chute at 100 North La Salle Street, Chicago, Illinois, an envelope containing a true copy thereof together with a true copy of said findings of fact and conclusions of law in the above entitled cause, properly sealed, postage prepaid, addressed as above, before the hour of 5:00 o'clock P. M. on the 8th day of January, A. D. 1947.

Thomas G. McBride.

Subscribed and sworn to before me this 8th day of January, A. D. 1947.

Colette Diver,
Notary Public.

(Seal)

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281 And on the same day, to wit, on the 10th day of January, 1947, being one of the days of the regular December, 1946 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry, to wit:

282 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—46-C-1886) • •

It Is Ordered by the Court that leave be and it is hereby given to the defendant to file within five days objections to the plaintiff's proposed findings of fact and conclusions of law.

283 And afterwards on, to wit, the 14th day of January, 1947 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Objections to Proposed Findings of Fact and Conclusions of Law in words and figures following, to wit:

284 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—46-C-1886) • •

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes Watson Bros. Transportation Co., Inc., defendant herein, and files its objections to the proposed findings of fact and conclusions of law submitted by the plaintiff herein, and alleges the following:

1. That on December 23, 1946 this Court on the motion of the plaintiff directed a verdict by its instruction to the jury finding "We, the jury, find the defendant, Watson Bros. Transportation Co., Inc., guilty of unlawfully withholding from the plaintiff, Central States Cooperatives, Inc., possession of the premises described in plaintiff's amended complaint herein, and that the right to the possession of the said premises is in the plaintiff."

2. That the defendant's position is that this Court is

without jurisdiction or authority to make findings of fact and enter conclusions of law herein.

3. The defendant further objects to the findings of
285 fact and conclusions of law since there was sufficient evidence to go to the jury, and that the jury should have found on the facts and issues involved under proper instruction of the Court that any findings of fact made by the Court and conclusions of law made by the Court are not proper and should not be made.

4. This defendant having noticed an appeal from the judgment order of Court entered on the directed verdict of the jury contends that said action of Court in directing the verdict and entering its order was erroneous since the Court should have submitted the issue to the jury with the proper instructions and all conclusions of law entered by the Court in support of its judgment order are likewise erroneous.

5. This being a trial by jury and the Court having entered its verdict on the motion of the plaintiff as above alleged, only after the submission of evidence on the part of the defendant, there is therefore no disputed evidence upon which findings of fact should be made.

Respectfully submitted,

Watson Bros. Transportation Co., Inc.,
A Nebraska Corporation,
Defendant.

By Sherwin & Sherwin,
Its Attorneys.

By Theodore R. Sherwin.

Sherwin & Sherwin,
Attorneys for Defendant,
209 South LaSalle St.
Chicago, Illinois,
Telephone: Central 2010.

286 And afterwards, towit, on the 22nd day of January, 1947, being one of the days of the regular December 1947 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw District Judge, appears the following entry, to wit:

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287 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—46-C-1886) • •

ORDER.

This cause coming on to be heard on the motion of Watson Bros. Transportation Co., Inc., defendant-appellant include in the record on appeal the photostatic copies of the original exhibits, which photostatic copies were substituted for the originals by order of this Court on the trial of this cause, notice having been given all parties of interest, and the Court being fully advised in the premises,

It Is Therefore Hereby Ordered, Adjudged and Decreed that the Clerk of the District Court be, and he is hereby authorized to include in the record on appeal the photostatic copies of the original exhibits, which photostatic copies were substituted for the originals by order of this Court on the trial of this cause.

Enter:

Shaw,
Judge.

January 22, 1947.

288 And afterwards, to wit, on the 23rd day of January, 1947, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appear the following entries, to wit:

289 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—46-C-1886) • •

FINDINGS OF FACT.

The court, upon its own motion, upon hearing on the plaintiff's motion for directed verdict made at the close of the defendant's case, makes the following findings of fact:

1. That Central States Cooperatives, Inc., a District of Columbia corporation, plaintiff, is and has been since June 25, 1946, the owner of the legal title in fee simple of the real estate and premises situated in the City of Chicago, County

of Cook and State of Illinois, described in the amended complaint.

2. That when the plaintiff took title to the premises they were subject to a lease dated July 31, 1945, between Charles H. Morse, Jr., as lessor, and Watson Bros. Transportation Co., Inc., a Nebraska Corporation, as lessee, defendant, for a term from October 1, 1945, to September 30, 1946.

3. That the lease contained a provision that the lessor, upon at least ninety days' written notice to the lessee of his intention so to do, might cancel and terminate the said lease in the event of a bona fide sale, provided that the lessor shall give notice and permit the lessee within ten days of the receipt of the notice upon the lessee's written election, to purchase the premises upon like terms, conditions and for like consideration.

290 4. That Morse on May 27, 1946 made a contract with the plaintiff to sell the premises in question to the plaintiff for the sum of $100,000 and gave notice in writing to the defendant of such intention and of the terms, conditions, and consideration of the contract; that the date of the receipt by the defendant of the notice was June 1, 1946; that the defendant did not within the ten days of the receipt of the notice, or at any other time, give written notice of an election to purchase the premises upon like terms, conditions and consideration.

5. That on June 10, 1946, Morse gave written notice to the defendant of his intention to terminate and did terminate said lease, effective September 30, 1946.

6. That the said lease also provided that the lessee should have an option of renewing the lease for a period of one year following the expiration of the term by giving written notice in writing to the lessor by registered mail at least sixty days prior to the expiration of the term.

7. That the defendant as lessee did not exercise its option of renewing the lease by written notice, or otherwise, at any time.

8. That the said lease expired on September 30, 1946.

9a. That on June 6, 1946, William Wolfe, Vice President of the defendant corporation, discussed with Laurie L. Lehtin, General Manager of the plaintiff corporation, the possibility of the plaintiff leasing to the defendant the entire premises, for a term of one year beginning October 1, 1946; Lehtin stated that the plaintiff desired to lease only the dock space on the premises to the defendant, in the

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event that the plaintiff should acquire the premises; Wolfe stated that the defendant would be willing for the plaintiff to use some part of the garage and office space and erect some sort of steel building on some part of the premises; that no tentative or other agreement was reached between Wolfe and Lehtin; that Lehtin had no authority to bind the plaintiff to any agreement of lease on the premises but
291 only to enter into preliminary discussion and to report to his board of directors; that such discussion between Wolfe and Lehtin contemplated the making of a written lease at any terms tentatively agreed upon; but the defendant did not promise the plaintiff, nor did the plaintiff seek or request the promise of the defendant that the defendant should refrain from exercising its option to purchase the premises; that the defendant was not from June 1st to June 10, 1946 ready, able or willing to exercise its option of purchase of the said premises upon the same terms, conditions and consideration as offered by the plaintiff to Morse in the contract of May 27, 1946.

9b. That William Wolfe, Vice-President of the defendant corporation on June 7, 1946, discussed with one Edward Richter the possibility of leasing the entire premises from the plaintiff for a term of one year, beginning October 1, 1946, should the plaintiff complete its purchase of the premises under its contract; Richter stated that he thought the plaintiff would not lease more than the dock space to the defendant; Wolfe stated that the defendant would be willing to pay $850.00 per month for a year's lease on the entire premises and permit the defendant to use some part of the garage and office space and erect a steel structure on some part of the premises; that Richter stated that he thought it was a deal and Wolfe asked that it be put in writing before Wolfe left the city to go back to the offices of the defendant in Omaha; that Richter had no authority to bind the plaintiff to any agreement of lease of the premises; that such discussion as occurred between Wolfe and Richter contemplated the making of a written lease on terms and conditions to be approved by the plaintiff; that no agreement of lease came into existence between the plaintiff and defendant concerning the premises in question because of the discussion which occurred between Wolfe and Richter.

9c. That on June 7, 1946 plaintiff made an offer in writing to make a lease to the defendant to a portion of

the premises in question, being the dock space, not including the garage and office, for use as a dock terminal, to become effective upon the plaintiff acquiring the said
292 premises for a term ending December 31, 1946, with an option to the defendant on sixty days' notice of renewal for one year to December 1, 1947, at $450.00 a month payable on the 1st of each month to and including December, 1946, and for $650.00 during the option period to and including the month of December, 1947, replacing the then lease to the defendant from Morse and providing that as soon as the plaintiff acquired title to the property, and not later than July 15, 1946 if the plaintiff completed the purchase of the property by that time, the plaintiff would occupy the garage and office space on the premises; that the remaining terms and conditions would be such as should be mutually agreed upon. That this written offer was delivered in person to William Wolfe, Vice-President of the defendant corporation on July 8, 1946, with the understanding that such offer was to remain open a few days; that such offer was not accepted by the defendant within a few days or at any other time.

9d. The receipt by William Wolfe of the Plaintiff's written offer by letter dated June 7, 1946 put the defendant on notice that the plaintiff was not willing to rent the entire premises to the defendant for a term of one year commencing October 1, 1946 for a rental of $850.00 per month, as the defendant had proposed. On June 8, 1946, after receiving plaintiff's written offer, Wolfe left the city of Chicago and returned to Omaha. The defendant had after receiving the written offer of the plaintiff the rest of the 8th of June, the 9th and 10th of June, 1946 in which to exercise its option to purchase the premises from Morse but failed to exercise or take any action whatever looking to the exercise of such option; the defendant did not suffer any substantial change for the worse in its position in consequence of any agreement with the plaintiff or in consequence of any act or omission of the plaintiff; that the defendant did not do or perform any act in performance or part performance of any agreement with the plaintiff or any act for the purpose of performing any agreement with the plaintiff or any act which referred exclusively to any agreement with the plaintiff or any act which can be explained consistently with any other contract than the alleged oral agreement of lease between the plaintiff and defendant.

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293 10. That on June 25, 1946 the plaintiff through its attorney addressed a letter to the defendant withdrawing the offer because of the defendant's failure to respond, but indicated that the plaintiff would be willing to re-enter negotiations for a lease if the defendant responded within five days; the defendant did not respond to such communication by letter or otherwise.

11. That on July 29, 1946 the plaintiff by its attorney addressed a letter to the plaintiff terminating all negotiations in relation to a lease from the plaintiff to the defendant upon such premises or any portion thereof. The defendant made no response to this communication by letter or otherwise.

12. That on or about October 1, 1946 the defendant sent to the plaintiff a check for the sum of $800.00; that the plaintiff returned this check to the defendant on October 2, 1946, by letter, stating that the lease of the defendant had expired September 30, 1946.

Elwyn R. Shaw,
Judge.

294 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

CONCLUSIONS OF LAW.

The Court upon its own motion upon hearing on the plaintiff's motion for directed verdict, made at the close of the defendant's case, makes the following conclusions of law in this case:

(1) There is no competent evidence in the record to justify submitting the case to the jury.

(2) The evidence in support of the defendant's affirmative defense is insufficient as a matter of law to support the case of the defendant.

(3) The defendant has not sustained its burden of proof on its affirmative defense by any competent or sufficient evidence, because (a) Before there can be a contract of lease between the parties, the parties must agree upon all the terms and conditions of the supposed contract; where

one party (the defendant) offers and proposes a lease on certain terms which are not accepted by the second party (the plaintiff), and where the second party (the plaintiff) makes a counter offer or proposal on certain other terms and conditions which are not accepted by the first party (the defendant), no agreement of lease comes into existence between the parties.

295 (b) To create a valid contract of lease there must be a definite agreement as to the extent and bounds of the property leased, a definite and agreed term, a definite and agreed price or rental, and a definite time and manner of payment.

(c) If parties who are negotiating for a lease of premises contemplate that a formal written lease will be drawn up and signed, an oral agreement of lease comes into existence between the parties only when such formal lease is executed by the parties.

(d) The defendant has not shown that an agreement of oral lease was entered into by any officer or agent of the plaintiff having authority or competent to bind the plaintiff to such an oral lease, nor can agency be shown by the testimony of or conversation with the supposed agent or agents.

(4) The affirmative defense sought to be made by the defendant is upon oral agreement which is subject to the objection of the Statute of Frauds, as being an agreement that was not to be performed wtihin the space of one year from the making thereof;

(5) The defendant has not by the allegations of its answers or by any other pleading herein, invoked the equitable jurisdiction of this Court in this case to relieve the defendant of the operation of the Statute of Frauds. This is a special statutory action by law before a jury. Part performance of a contract not enforceable because of the Statute of Frauds does not operate, in an action at law, to take the case out of the statute.

(6) The defendant has not proved such part performance of a supposed oral agreement of lease between the plaintiff and defendant as to relieve the defendant of the objection of the Statute of Frauds, because

(a) The defendant has not shown any substantial change for the worse in his position in consequence of the supposed oral agreement.

(b) The supposed oral agreement and its terms must be established by clear, unambiguous and unequivocal evidence, leaving no reasonable doubt in the mind of the court, since the object of the statute was to prevent the introduction of loose and indeterminate proofs of what ought
296 to be established by solemn written contracts.

(c) The part performance of the supposed oral agreement relied upon to take the case out of the Statute of Frauds must place the party who has performed in such a situation that it would be a fraud done him if the agreement were not carried out.

(d) The acts of part performance of the supposed oral agreement must have been done under the agreement itself and for the sole purpose of performing it, must refer exclusively to the agreement and must be such as cannot be explained consistently with any other agreement than the one alleged and must be such as would not have been performed but for the agreement.

Elwyn R. Shaw,
Judge.

297 In the District Court of the United States.

* * (Caption—46-C-1886) * *

Thursday, January 23, 1947.

Present: Honorable Elwyn R. Shaw, District Judge.

The Court being fully advised in the premises

It Is Ordered that the objections of the defendant heretofore filed herein to the proposed findings of fact and conclusions of law be and they are hereby overruled.

298 And on the same day on, to wit, the 20th day of January, 1947 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

299 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1886) * *

APPELLANT'S DESIGNATION OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL.

Now comes Watson Bros. Transportation Co., Inc., defendant-Appellant herein, by its duly authorized attorneys, Sherwin & Sherwin, and hereby designates the following portion of the record, evidence and proceedings to be contained in the record of appeal in the above proceedings:

Description:	Date of Filing
Original Praecipe and Statement of Claim filed in Municipal Court of Chicago	October 2, 1946
Petition for Removal filed by defendant, Watson Bros. Transportation Co., Inc., in the Municipal Court of Chicago	October 15, 1946
Removal Bond filed by defendant, Watson Bros. Transportation Co., Inc., in the Municipal Court of Chicago	October 15, 1946
Order of Municipal Court approving Petition for Removal and Removal Bond	October 15, 1946
(All of the foregoing documents appear in the removal record filed in this Court on November 14, 1946.)	
300 Surety Bond for Costs	November 14, 1946
Answer of Watson Bros. Transportation Co., Inc.,	November 19,1946
Order of Court giving leave to Plaintiff, Central States Cooperatives, Inc., to file an amended complaint, and ruling that the defendant, Watson Bros. Transportation Company, answer said amended complaint within ten days	November 25,1946

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Description	Date of Filing
Amended Complaint of Central States Cooperatives, Inc.	November 25,1946
Jury demand by defendant, Watson Bros. Transportation Co., Inc.	November 25,1946
Motion of defendant, Watson Bros. Transportation Co., Inc., to strike amended complaint	December 5, 1946
Notice of plaintiff and motion of plaintiff to strike the defendant's motion to strike amended complaint	December 9,1946
Order of Court overruling motion of defendant to strike amended complaint, and setting the cause for trial	December 10, 1946
Order of Court on defendant to file answer to amended complaint instanter and to produce certain records	December 17, 1946
Answer to amended complaint filed by defendant, Watson Bros. Transportation Co., Inc.	December 17, 1946
Plaintiff's motion for directed verdict	December 23, 1946
Instructions to the jury by the Court	December 23, 1946
Verdict of the Jury	December 23, 1946
Order of Court giving judgment of verdict	December 23, 1946
Order of Court giving leave to substitute photostatic copies for original exhibits	December 23, 1946
Order of Court fixing supersedeas bond	December 23, 1946
Notice of Appeal	December 24, 1946
Order approving supersedeas bond and making notice of appeal of supersedeas	December 24, 1946
Order of Court on the plaintiff to prepare and submit findings of fact and conclusions of law.	January 8, 1947
301 Proposed findings of fact and conclusions of law submitted to the Court by the plaintiff	January 10, 1947
Order of Court giving the defendant leave to file written objections to the said findings of fact and conclusions of law	January 10, 1947

Description	Date of Filing
Objections filed by the defendant to proposed findings of fact and conclusions of law	January 14, 1947
Any and all future orders of Court with respect to findings of fact and conclusions of law	
Any and all findings of fact and conclusions of law approved and entered by the Court.	
Statement of points upon which appellants intend to rely.	
All testimony and proceedings at the trial contained in the Transcript of Proceedings, prepared by Edward Newlander, Official Court Reporter.	
Clerk's Certificate.	
Any and all future findings and Orders of the Court with respect to extensions of time for defendant-appellant to file its record on appeal and docket its appeal in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.	
Order of Court giving leave to take up on the record on appeal the photostatic copies of the exhibits heretofore substituted for originals on the trial of the cause.	

Sherwin & Sherwin,

By Theodore R. Sherwin,
Attorneys for Watson Bros. Transportation Co. Inc., Defendant-Appeallant.
209 South LaSalle Street,
CEN 2010

Received a copy of the foregoing this 20th day of January, 1947.

Brenner & McBride,
Attorney for Plaintiff-Appellee.

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302 And afterwards on, to wit, the 28th day of January, 1947 came the Plaintiff-Appellee by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

303 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—46-C-1886) * *

APPELLEE'S ADDITIONAL DESIGNATION OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL.

Now comes Central States Cooperative, Inc., a corporation, plaintiff-appellee herein, by its duly authorized attorneys, Brenner & McBride, and hereby designates the additional following portions of the record, evidence, and proceedings to be contained in the record on the appeal in the above proceedings:

Description	Date of Filing
Summons and return filed in Municipal Court	November 14, 1946
Affidavit of Wolfe to removal petition of October 21, 1946	November 14, 1946
Notice of plaintiff of motion for leave to file amended complaint	November 25, 1946
Order of court setting cause for December 10 on pleadings and for trial December 17, 1946	December 9, 1946
Motion of defendant for continuance	December 10, 1946
Affidavit of Sherwin for continuance	December 10, 1946
Affidavit of Garrity	December 10, 1946
Notice of motion of plaintiff to take default and for discovery	December 17, 1946
304 Motion for same	December 17, 1946
Affidavit for same	December 17, 1946
Transcript of proceedings on pretrial conference	December 20, 1946
Order of court on pretrial conference and case continued to December 23, 1946	December 20, 1946
Notice of motion of plaintiff	January 8, 1947

Description	Date of Filing
Order of court as to findings of fact and conclusions of law	January 8, 1947
Transcript of proceedings before the court on January 8, 1947	January 8, 1947
Notice of motion of plaintiff	January 10, 1947
Transcript of proceedings before the court on January 10, 1947	January 10, 1947

Brenner & McBride,
By Thomas G. McBride,
Attorneys for Central States Cooperatives, Inc., Plaintiff-Appellee.
100 N. LaSalle Street
Ran. 4477.

Received a copy of the foregoing this 28th day of January, 1947.

Sherwin & Sherwin.

305 Northern District of Illinois, } ss:
Eastern Division }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the designations filed in this Court in the cause entitled: Central States Cooperatives, Inc., *vs.* Watson Bros. Transportation Co., Inc., No. 46 C 1886, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original Exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 30th day of January, A. D. 1947.

Roy H. Johnson,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record filed in this Court on the nineteenth day of May, 1947, in

Cause No. 9291.

Central States Cooperatives, Inc.,
Plaintiff-Appellee,

vs.

Watson Brothers Transportation Company, Inc.,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of February, A. D. 1948.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the First day of October, in the year of our Lord One thousand nine hundred and forty-six, and of our Independence the one hundred and seventy-first.

Central States Cooperatives, Inc., *Plaintiff-Appellee,* 9291 *vs.* Watson Bros. Transportation Company, Inc., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit, on the first day of February, 1947, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellant which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Central States Cooperatives, Inc., A District of Columbia Corporation, *Plaintiff-Appellee,* *vs.* Watson Bros. Transportation Co., Inc., A Nebraska Corporation, *Defendant-Appellant.*	No. 9291.

APPEARANCE.

We hereby enter our appearance as attorneys for Watson Bros. Transportation Co., Inc., Defendant-Appellant, in the above entitled cause.

Sherwin & Sherwin,
Attorneys.
By Theodore R. Sherwin.

Endorsed: Filed Feb. 1, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit, on the sixth day of February, 1947, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellee which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 9291.

Central States Cooperatives, Inc.,
Plaintiff-Appellee,

vs.

Watson Bros. Transportation Co., Inc.,
Defendant-Appellant.

The Clerk will enter my appearance as counsel for appellee.

Thomas G. McBride,
100 N. La Salle St.,
Chicago 2, Illinois.

Endorsed: Filed Feb. 6, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit, on the ninth day of June, 1947, there was filed in the office of the Clerk of this Court the appellant's brief which said brief is not set forth here.

And afterwards, to-wit, on the thirtieth day of June, 1947, there was filed in the office of the Clerk of this Court the Appellee's Brief which said brief is not set forth here.

And afterwards, to-wit, on the eleventh day of July, 1947, there was filed in the office of the Clerk of this Court the Appellant's Reply Brief which said reply brief is not set forth here.

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And afterwards, to-wit, on the twenty-third day of September, 1947, there was filed in the office of the Clerk of this Court a Notice and Motion by the appellant to reverse and remand which said Notice and Motion are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9291
Central States Cooperatives, Inc.,
Plaintiff-Appellee,
vs.
Watson Bros. Transportation Co., Inc.,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
Elwyn R. Shaw,
District Judge.

NOTICE.

To: Brenner & McBride, Esq.,
100 North LaSalle Street,
Chicago, Illinois,
Attorneys for Plaintiff-Appellee.

Please Take Notice that on Tuesday, September 23, 1947 we will file in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit, a Motion together with a Brief in Support of the Motion, copies of which motion and brief is herewith served upon you.

Julius L. Sherwin and
Theodore R. Sherwin,
Attorneys for Defendant-Appellant,
By Theodore R. Sherwin.

Received a copy of the above and foregoing Notice, together with a copy of the Motion and Brief therein referred to this 23rd day of September, 1947.

Brenner & McBride,
Attorneys for Plaintiff-Appellee.

Endorsed: Filed Sept. 23, 1947. Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9291
Central States Cooperatives, Inc.,
Plaintiff-Appellee,

vs.

Watson Bros. Transportation Company, Inc.,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Elwyn R. Shaw, District Judge.

MOTION.

Now comes Watson Bros. Transportation Co., Inc., defendant-appellant, by Theodore R. Sherwin, its attorney, and moves the Court for the entry of an order to reverse the judgment order herein appealed of the District Court, and to remand the cause to the District Court with instructions to dismiss the complaint for the reason that the cause of action between the parties hereto has ceased to exist and there is now no actual controversy involving real and substantial rights between the parties but there remains purely an abstract and moot question; or in the alternative, to reverse the judgment of the District Court and remand the cause to the District Court with instructions to the District Court to remand the cause to the state court on the ground that the District Court was without jurisdiction to hear and determine this cause for the reason that this cause was not

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properly removable to the District Court from the state court; and in support of the said motion, states the following:

MOTION FOR AN ORDER TO REVERSE THE JUDGMENT ORDER OF THE DISTRICT COURT AND TO REMAND THE CAUSE TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISMISS THE COMPLAINT, THE ISSUES ON APPEAL HAVING BECOME MOOT.

1. On July 14, 1947, while this appeal was pending before this court, plaintiff-appellee, Central States Cooperatives, Inc., (hereinafter referred to as Central for convenience), sold and conveyed the premises, the possession of which is the subject matter of this suit between the parties. The conveyance was made on July 14, 1947. A true and correct photostatic copy of record of said conveyance, filed in the Office of the Recorder of Deeds of Cook County, Illinois, on July 15, 1947 as Document No. 14101080, and recorded in Book 42434 of Records at page 29, is attached hereto marked "Exhibit A" and by this reference made a part hereof. The premises conveyed are fully described in said "Exhibit A" and are identical with the premises described in the amended complaint filed by plaintiff-appellee in the District Court, and upon which amended complaint, the District Court entered its judgment for possession (Tr. 40-42, 143-145). Yellow Terminals, Inc., to whom the said conveyance was made, has on its own behalf filed suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, for possession of the identical premises based upon its acquisition of title from Central; said suit is entitled Yellow Terminals, Inc. *vs.* Watson Bros. Transportation Co., Inc., No. 47 C 1145, which was filed on August 5, 1947. As a matter of fact, counsel for the plaintiff-appellee is likewise counsel for the plaintiff in that action. A certified copy of the said complaint, marked "Exhibit B", is attached hereto, and by this reference is made a part hereof. The premises involved and described on page two of the said complaint are identical with the premises described in the amended complaint filed by plaintiff-appellee in the District Court, and upon which amended complaint the District Court entered its judgment for possession against the defendant-appellant (Tr. 40-42, 143-145).

2. The plaintiff-appellee having sold the premises involved in this cause to Yellow Terminals, Inc., and Yellow Terminals, Inc., having filed a suit in its own behalf for possession, there is now no longer any controversy between plaintiff-appellee and defendant-appellant for possession of these premises and there remains before this court a purely moot and abstract question. The controversy on this appeal between the parties having become moot by the action of the plaintiff-appellee, the proper order for this court for this court as we shall demonstrate in our brief, is to reverse the judgment of the trial court and remand the cause to the trial court with instructions to dismiss the complaint. Otherwise, there would be a judgment for possession left in effect in favor of a person who is no longer entitled to possession.

MOTION FOR REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT AND TO REMAND THE CAUSE TO THE DISTRICT COURT WITH INSTRUCTIONS TO REMAND THE CAUSE TO THE STATE COURT FOR WANT OF JURISDICTION OF THE DISTRICT COURT.

1. As affirmatively appears from the record in this cause, the plaintiff-appellee, Central, is a District of Columbia corporation, and therefore a citizen of the District of Columbia (Tr. 7, 40). The suit was originally filed in the Municipal Court of Chicago (Tr. 3-6) and was removed on the petition of the defendant-appellant, Watson, to the District Court. The basis for the removal was the diversity of citizenship existing between the plaintiff-appellee, Central, as a corporation and a citizen of the District of Columbia, and the citizenship of the defendant-appellant, Watson, as a corporation and citizen of the State of Nebraska (Tr. 7, 25). Neither of the parties to the action, nor the Court below, raised any question as to the jurisdiction of the trial court to hear and determine this suit. The District Court was without jurisdiction to hear and determine this suit by reason of the fact that the district court is without original jurisdiction to hear and determine a suit involving diversity of citizenship where one of the parties to the cause is a citizen of the District of Columbia. There was no jurisdiction to hear and determine this suit when it was removed since the District Court does not acquire jurisdiction in a case removed from the state court unless

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suit could have originally been brought in the Federal Court. There was no jurisdiction in the District Court to hear and determine the cause after its removal.

Wherefore, defendant-appellant moves the Court for the entry of an order to reverse the judgment order herein appealed of the District Court and to remand the cause to the district court with instructions to dismiss the complaint, the issues on appeal having become moot, or in the alternative, to reverse the judgment of the District Court and remand the cause to the District Court with instructions to the District Court to remand the cause to the Municipal Court of Chicago for want of jurisdiction of the District Court.

Watson Bros. Transportation Co., Inc.,
Defendant-Appellant.
Julius L. Sherwin and
Theodore R. Sherwin,
By Theodore R. Sherwin.

State of Illinois, } ss.
County of Cook. }

Theodore R. Sherwin, being first duly sworn on his oath, deposes and says that he has prepared the foregoing Motion on behalf of the defendant-appellant and is familiar with its contents; that the allegations of fact therein contained are all true and correct.

.....

Subscribed and sworn to before me this 22nd day of September, 1947.

.....

Notary Public.

Endorsed: Filed Sept. 23, 1947. Kenneth J. Carrick, Clerk.

"EXHIBIT A."

State of Illinois, } ss.
County of Cook. }

I, Edward J. Kaindl, Recorder of Deeds, and Keeper of the Records of said Recorder of Deeds, in and for said County, in the State aforesaid, Do Hereby Certify, that the following is a true and correct photographic copy of the record of a certain Instrument filed in said Office the Fifteenth day of July, A. D. 1947, as Document No. 14101080 and recorded in Book 42434 of Records, at Page 29.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at Chicago, this Twenty-ninth day of July, A. D. 1947.

Edward J. Kaindl,
Recorder of Deeds.

This Indenture, Witnesseth:

That the grantor, Central States Cooperatives, Inc., a corporation organized and existing under the laws of the District of Columbia, for and in consideration of the sum of One hundred seven thousand ($107,000.00) dollars, and other good and valuable consideration, receipt whereof is hereby acknowledged, conveys and warrants unto Yellow Terminals, Inc., a corporation organized and existing under and by virtue of the laws of the state of Oklahoma, the following described property situated in the city of Chicago, county of Cook, and state of Illinois, to-wit:

That part of the North Half (N½) of the Northwest Quarter (NW¼) of Section Thirty two (32), Township Thirty nine (39) North, Range Fourteen (14) East of the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street, as it exists South of vacated West 33rd Street, which is Fifty (50) feet wide, extended Northwesterly with North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy four (274) feet more or less to Westerly dock line of South fork of South branch of Chicago River, as occupied; thence North Forty one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One Hundred Sixty six (166) feet Eight and

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One-eighth ($8\frac{1}{8}$) inches; thence North Thirty two (32) degrees, Forty seven (47) minutes West, Sixty three (63) feet Four and One-half ($4\frac{1}{2}$) inches; thence North Twenty nine (29) degrees, Forty six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and One-half ($11\frac{1}{2}$) inches more or less along said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decreet's Subdivision of Lots Twenty one (21), Twenty two (22) and Twenty three (23) in Alice Lynch's Subdivision of the Northwest quarter ($NW\frac{1}{4}$) of Section Thirty two (32), Township Thirty nine (39) North, Range Fourteen (14) East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty eight (288) feet Nine and five-eighths ($9\frac{5}{8}$) inches more or less to intersection of said line with center line of vacated Iron Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of vacated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred Ninety eight (498) feet and Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty five (106,155) square feet, more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, including the interest of the grantor in and to the following easements:

(a) Easement created by and between American Terminal Company, an Illinois corporation, and Illinois Steel Company, an Illinois corporation, by grant dated November 13, 1945 and recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on November 16, 1945 as Document No. 13660486.

(b) Easement reserved in the deed from Illinois Steel Company to Charles H. Morse, Jr., dated November 16, 1945 and recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on November 16, 1945 as Document No. 13660726.

To Have and to Hold the said premises as above described with the appurtenances and hereditaments thereunto belonging, unto the said grantee, its successors and

assigns Forever, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the state of Illinois.

This conveyance is expressly made subject to the following:

1. General taxes for the year 1947 and subsequent years.
2. Building lines and building and liquor restrictions of record.
3. Zoning and building ordinances.
4. Roads and highways, if any.
5. Easement for right of way and for railroad purposes granted to the Chicago & Indiana State Line Railway Co., an Illinois corporation, by instrument of agreement and grant and perpetual lease, executed by John A. Yale and others, dated June 25, 1880, and recorded August 6, 1886 in Book 1657, page 538, as Document No. 644844.
6. Rights to use switch tracks in vacated Iron Street as granted by deed and assignment dated January 30, 1943 and recorded February 17, 1943 as Document No. 13031987 made by and between Illinois Steel Company, Chicago Junction Railway Company and the Chicago River and Indiana Railroad Company.
7. Rights of the United States of America, State of Illinois, City of Chicago, the Sanitary District of Chicago and of the Public, to manage, control and regulate or alter the improvements on the Easterly line of the premises in question, being the Westerly dock line of the South Fork of the South Branch of the Chicago River as occupied, and rights of the adjoining owners abutting on said river to have maintained an uninterrupted flow of the waters therein.
8. Terms, provisions and agreements relating to the aforesaid easements which are contained in the instruments recorded as Document Nos. 13660486 and 13660726, and all rights reserved therein and all acts done or suffered which may affect said easements.
9. Rights of adjoining owner or owners to the concurrent use of said easements.

In Witness Whereof, the said Central States Cooperatives, Inc., a corporation, has caused its corporate seal to be hereto affixed and has caused its name to be signed, to

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these presents by its president and attested by its secretary this 14th day of July, A. D. 1947.

Central States Cooperatives, Inc., a corporation organized and existing under and by virtue of the laws of the District of Columbia,
By Jacob Liukku,
President.

(Corporate Seal)

Attest:
Louis O. Harper,
Secretary.

State of Illinois, } ss.
County of Cook. }

I, Collette Diver, notary public in and for said county, in the state aforesaid, Do Hereby Certify that Jacob Liukku, personally known to me to be the president of Central States Cooperatives, Inc., a corporation, and Louis O. Harper, personally known to me to be the secretary of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such president and secretary, they signed and delivered the said instrument as president and secretary of said corporation, and caused the corporate seal of said corporation to be affixed thereto, pursuant to authority, given by the Board of Directors of said corporation as their free and voluntary act, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of July, A. D. 1947.

Collette Diver,
Notary Public.

(Notarial Seal)

My Commission expires June 17, 1951.

Endorsed: 14101080. State of Illinois, Cook County, ss. No. ..... Filed for Record 1947 Jul 15 PM 3 15 and Recorded in Book ....., Page ..... Edward J. Kaindl, Recorder.

(Cancelled $117.70 worth of revenue stamps.)

"EXHIBIT B."

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Yellow Terminals, Inc., a Delaware corporation,
Plaintiff,
vs.
Watson Bros. Transportation Company, Inc., a Nebraska corp.,
Defendant.
No. 47 C 1145.

COMPLAINT.

Now comes the plaintiff, Yellow Terminals, Inc., a Delaware corporation, by Brenner & McBride, its attorneys, and for a cause of action alleges as follows:

1. That the plaintiff is a corporation organized, incorporated, and existing under and by virtue of the laws of the state of Delaware, and is a citizen of the state of Delaware.

2. That the defendant is a corporation organized, incorporated and existing under and by virtue of the laws of the state of Nebraska, and is a citizen of that state.

3. That this is a controversy between a citizen of the State of Delaware and a citizen of the state of Nebraska, of which controversy the District court of the United States has jurisdiction, and is a controversy which can be fully determined between them; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) dollars.

4. That Yellow Terminals, Inc. is and has been since the 14th day of July, 1947 the owner of the legal title in fee simple in and to the premises situated in the city of Chicago, county of Cook and State of Illinois, as follows, to-wit:

That part of the North Half ($N\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section Thirty two (32), Township Thirty nine (39) North, Range Fourteen (14) East of

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the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street, as it exists South of vacated West 33rd Street, which is Fifty (50) feet wide, extended Northwesterly with North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy four (274) feet more or less to Westerly dock line of South fork of South branch of Chicago River, as occupied; thence North Forty one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One Hundred Sixty six (166) feet Eight and One-eighth (8⅛) inches; thence North Thirty two (32) degrees, Forty seven (47) minutes West, Sixty three (63) feet Four and One-half (4½) inches; thence North Twenty nine (29) degrees, Forty six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and One-half (11½) inches more or less along said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decreet's Subdivision of Lots Twenty one (21) Twenty two (22) and Twenty three (23) in Alice Lynch's Subdivision of the Northwest Quarter (NW¼) of Section Thirty two (32), Township Thirty nine (39) North, Range Fourteen (14) East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty eight (288) feet Nine and five eighths (9⅝) inches more or less to intersection of said line with center line of vacated Iron Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of vacated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred ninety eight (498) feet and Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty five (106,155) square feet, more or less; in Cook County, Illinois;

and commonly known as 3201 S. Iron Street, Chicago, Illinois having derived title to the said premises by warranty deed from Central States Cooperatives, Inc., a corporation, dated and duly acknowledged the 14th day of July, 1947 and recorded in the Recorder's Office of Cook County, Illinois on the 15th day of July, 1947.

5. That upon taking title to the said premises plaintiff

herein found that Watson Bros. Transportation Company, Inc., a corporation, defendant, was in possession of the said premises without any lease, license, or other agreement entitling the defendant to the possession of the said premises, or any part thereof.

6. That the plaintiff herein did on the 30th day of July, 1947 demand in writing of the defendant that the defendant immediately surrender to the plaintiff the possession of the premises described in Paragraph 4 hereinabove.

7. That the defendant does now wilfully, wrongfully, and unlawfully withhold from plaintiff possession of the premises hereinabove described in Paragraph 4, and has from July 15, 1947, wilfully, wrongfully and unlawfully remained in possession of the premises hereinabove described in Paragraph 4, and has from July 15, 1947 wilfully, wrongfully and unlawfully remained in possession of the premises hereinabove described in paragraph 4, and is a trespasser upon said premises without any legal right or authority whatever.

Wherefore, the plaintiff prays the judgment of the court that the plaintiff is entitled to the possession of the whole of the premises hereinabove referred to, and that the defendant wilfully, wrongfully, and unlawfully withholds possession of the same from the plaintiff, and that execution issue in favor of the plaintiff and against the defendant for possession of the said premises, and that the plaintiff recover its costs herein from the defendant.

Yellow Terminals, Inc., a corporation,
Plaintiff,

By Brenner & McBride,
Its Attorneys.

By T. G. McBride.

Brenner & McBride,
Attorneys for Plaintiff,
100 N. La Salle Street,
Randolph 4477.

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United States of America,
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Complaint filed August 5, 1947, in the case of Yellow Terminals, Inc. *vs.* Watson Bros. Transportation Company, Inc., No. 47 C 1145, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 19th day of September, A. D. 1947.

Roy H. Johnson,
Clerk.

(Seal)

By S. M. Shepard,
Deputy Clerk.

Endorsed: Filed Sept. 23, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit on the fifteenth day of October, 1947, there was filed in the office of the Clerk of this Court the appellee's brief in opposition to appellant's motion of Sept. 23, 1947 which said brief in opposition is not set forth here.

And afterwards, to-wit, on the thirtieth day of October, 1947, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

October 30, 1947.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Central States Cooperatives, Inc., *Plaintiff-Appellee,*	]	Appeal from the District Court of the
9291 *vs.*	]	United States for
Watson Bros. Transportation Company, Inc., *Defendant-Appellant.*	]	the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the motion of counsel for the defendant-appellant for the entry of an order reversing the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, in this cause appealed from, and remanding the cause to the said District Court with instructions to dismiss the complaint, etc., be, and the same is hereby, Denied without prejudice to the defendant-appellant's right to renew the said motion at the time of the hearing on the merits on Monday, November 10, 1947.

And afterwards, to-wit, on the tenth day of November, 1947, there was filed in the office of the Clerk of this Court an appellant's brief in support of motion to reverse and remand which said brief in support of motion is not set forth here.

And afterwards, to-wit, on the twenty-eighth day of November, 1947, there was filed in the office of the Clerk of this Court the appellee's supplemental brief in opposition to brief of appellant in support of motion to reverse and remand, which said supplemental brief is not copied here.

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And afterwards, to-wit, on the twelvth day of December, 1947, there was filed in the office of the Clerk of this Court the opinion of the Court which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9291. October Term and Session, 1947.

CENTRAL STATES COOPERATIVES, INC., *Plaintiff-Appellee,*

vs.

WATSON BROS. TRANSPORTATION COMPANY, INC., *Defendant-Appellant.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

December 12, 1947.

Before EVANS and MAJOR, *Circuit Judges,* and LINDLEY, *District Judge.*

MAJOR, *Circuit Judge.* This appeal is from a judgment awarding to plaintiff the right to possession of certain property, in an action based upon the forcible entry and detainer statute of the State of Illinois. The judgment was entered upon a jury verdict directed by the court at the close of the defendant's evidence. The cause was instituted in the Municipal Court of the City of Chicago and removed on petition of the defendant to the District Court.

We are first met with the question of the jurisdiction of the District Court. This jurisdictional issue is raised in this court for the first time by the defendant, after having invoked the jurisdiction of the District Court and obtained an adverse judgment at its hands.

Plaintiff is a corporation and a citizen of the District of Columbia, while the defendant is a corporation and a

citizen of the State of Nebraska. The court's jurisdiction, if such it had, is dependent upon Sec. 24 (1) of the Judicial Code as amended by Congress in 1940 [54 Stat. 143 (1940), 28 U. S. C. A. Sec. 41 (1)], which so far as here material provides:

> "The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, * * where the matter in controversy * * (b) is between citizens of different states *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory* * *."

The italicized portion of the provision just quoted was added by the amendment of 1940. More specifically, the court prior to the 1940 amendment had jurisdiction only of controversies between citizens of different states. By the amendment that jurisdiction was enlarged to include controversies between the citizen of a state and one of the District of Columbia.

A decision as to the jurisdictional issue is dependent solely upon the constitutionality of the 1940 amendment. This issue poses the question as to whether Congress was empowered to thus enlarge the jurisdiction of Federal courts.

We need no more than mention the firmly established rule that a jurisdictional question may be raised at any stage of the proceedings. In fact, it is the duty of a reviewing court on its own volition and irrespective of whether the question has been raised by the parties to examine into the matter of jurisdiction. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 70; *Texas* v. *Florida*, 306 U. S. 398, 405. Jurisdiction cannot be waived; neither can it be acquired by assent of the parties. *United States* v. *Corrick*, 298 U. S. 435, 440; *Mitchell* v. *Maurer*, 293 U. S. 237, 244. Jurisdiction is subject to the same test where the case is before the court on removal from a State court as though it had been originally brought in the Federal court. *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374.

This ironclad rule takes no note of the apparent hardships and unfairness which its application may produce. Illustrative is the situation before us where the defendant, after invoking the jurisdiction of the Federal court, not only failed to call the attention of the court to the matter of its jurisdiction so that it might have an opportunity to

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rule thereon but raised no question until it had become the defeated party in the litigation. Plaintiff concedes that the jurisdictional question may be raised at any time but attempts to escape the rule by arguing that merely a constitutional question is presented which, like most other questions, cannot be raised for the first time on appeal. We need not cite or discuss the cases relied on by plaintiff in this respect for the reason that they are, in our judgment, beside the point. After all, the question here goes directly to the court's jurisdiction, and the fact that such jurisdiction involves the validity of the statute upon which it is predicated does not, in our judgment, impair the right of a litigant or the duty of the court on its own motion to consider and decide the issue. None of the cases called to our attention makes any distinction between a case where jurisdiction is dependent upon the constitutionality of a law and one where it rests upon any other basis.

Defendant contends that the sole power of Congress relative to the 1940 amendment is lodged in Art. III of the Constitution, which provides, so far as here material:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * *
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * to Controversies * * between Citizens of different States * *."

It has been firmly established, as plaintiff concedes, that a citizen of the District of Columbia is not a citizen of a State within the meaning of the constitutional article lastly quoted. *Hepburn* v. *Ellzey*, 2 Cranch 445; *Barney* v. *Baltimore City*, 6 Wallace 280; *Hooe* v. *Jamieson*, 166 U. S. 395; *O'Donoghue* v. *United States*, 289 U. S. 516. It, therefore, appears plain that the amendment of 1940 which conferred diversity jurisdiction of a controversy between a citizen of a State and a citizen of the District of Columbia was in excess of the power granted by Art. III, which limited such jurisdiction to controversies between citizens of different states.

Plaintiff makes no argument to the contrary, in fact tacitly concedes that such is the situation, but contends that

this excess power of Congress is to be found in Art. I, Sec. 8, which provides:

> "The Congress shall have Power * * [Clause 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, * * *
>
> "[Clause 18] To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

It is argued that the power "To exercise exclusive Legislation in all Cases whatsoever, over such District" is sufficiently broad and comprehensive to permit Congress to provide for diversity jurisdiction between a citizen of the District of Columbia and one of a State, notwithstanding the limitation imposed by Art. III. It is urged that these two provisions of the Constitution must be construed together, and when so construed the requisite power exists for the 1940 amendment. The precise question before us has not been passed upon by the Supreme Court or by a Circuit Court of Appeals. It has, however, been given much attention and study by the District Courts, as is evidenced by the fact that the question has been considered, decided, and an opinion published by nine of such courts. The District Court of Virginia, in *Winkler* v. *Daniels*, 43 F. Supp. 265, and the District Court of California in *Glaeser* v. *Acacia Mut. Life Ass'n.*, 55 F. Supp. 925, held the amendment constitutional. On the other hand, a District Court of Pennsylvania, in *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385, a District Court of Missouri in *Federal Deposit Ins. Corp.* v. *George-Howard*, 55 F. Supp. 921, a District Court of New York in *Behlert* v. *James Foundation, etc.*, 60 F. Supp., 706, a District Court of Massachusetts in *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593, a District Court of South Carolina in *Wilson* v. *Guggenheim*, 70 F. Supp. 417, a District Court of Maryland in *Feeley* v. *Sidney S. Schupper Inter-State Hauling System*, 72 F. Supp. 663, and a District Court of Virginia in *Willis* v. *Dennis*, 72 F. Supp. 853, held the amendment unconstitutional. Thus it would seem that the District Courts of the country have experienced a "field day" in constitutional erudition. The score to date is two in favor of and seven opposed to constitutionality.

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As a prelude to a consideration of the precise question before us, it may be pertinent to note two rather recent observations by the Supreme Court concerning Art. III (sometimes referred to as the Judiciary Article).

In *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, the court, concerning its own jurisdiction, stated (page 469):

> "It [the Supreme Court] was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article."

In *Lockerty* v. *Phillips*, 319 U. S. 182, the court had before it a situation wherein Congress had restricted the jurisdiction of Federal courts in certain matters. The court stated (page 187):

> "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe."

Plaintiff's argument that the congressional power over courts as contained in Art. III is implemented by the powers conferred upon it relative to the District of Columbia by Art. I so as to justify the amendment of 1940, is predicated almost entirely upon the reasoning of the District Court in *Winkler* v. *Daniels*, *supra*, and the authorities therein cited. For this reason, we shall briefly analyze the reasoning of that case as well as the authorities upon which it rests.

Much reliance is placed upon the congressional history of the amendment, and particularly the report of the sponsoring committee (page 266). The committee report, after quoting and discussing Sec. 8, Art. I of the Constitution, makes the following significant statement concerning Art. III:

> "The purpose of article III was to create an inde-

pendent judiciary with powers conferred directly by the Constitution. These powers cannot be taken away from Congress. The Constitution guarantees to certain persons the right to demand the exercise of these powers under certain circumstances. For example, a citizen of a State may do so when involved in a case or controversy with a citizen of another State. The mere fact that the Constitution guarantees this right to the citizens of a State in no way prohibits the Congress from extending that same privilege to others who are not technically citizens of a State. This does not mean that Congress may indiscriminately add to the jurisdiction or authority of the courts. Its powers to so add must in any case be found in the Constitution."

This reasoning of the committee that a citizen of a State has the constitutional right to invoke Federal jurisdiction of a controversy with a citizen of another State is, so we think, fallacious. Even Congress is not under any constitutional mandate to establish a Federal forum for litigants, either by reason of diversity of citizenship or otherwise. See quotation from *Lockerty* v. *Phillips, supra.* The citizen of a State is entitled to a Federal forum only under such circumstances and conditions as Congress in its discretion may provide. Moreover, even if the citizen of a State was entitled to such a forum as a matter of constitutional right, we fail to discern how that could be utilized as a basis for congressional power to confer the same right upon a citizen of the District of Columbia.

Neither do the authorities cited in the Winkler case and relied upon by the plaintiff here furnish any support for the constitutionality of the amendment. True, *Stoutenburgh* v. *Hennick,* 129 U. S. 141, *District of Columbia* v. *Murphy,* 314 U. S. 441, and *Neild* v. *District of Columbia,* 110 F. 2d 246, demonstrate the broad congressional power over the affairs of the District of Columbia and its citizens conferred by Sec. 8, Art. I of the Constitution. There is, however, no support in these cases for the contention that Congress because of such power became the repository of power over the Federal courts of the entire country further than that prescribed by Art. III.

Neither does the case of *O'Donoghue* v. *United States, supra,* so strongly relied upon, aid the plaintiff's contention but points strongly in the opposite direction. The court

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there was considering the power of Congress with reference to the courts of the District of Columbia and held that its power in that respect was greater than its powers over the courts of the country generally. The court stated (page 546):

> "If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, *as it is in dealing with the other federal courts,* the administrative and other jurisdiction spoken of could not be conferred upon the former. But the clause giving plenary power of legislation over the District enables Congress to confer such jurisdiction *in addition to the federal jurisdiction which the District courts exercise under Art. III,* notwithstanding that they are recipients of the judicial power of the United States under, and are constituted in virtue of, that article." (Emphasis ours.)

Thus, the court apparently recognized that the power of Congress as to Federal courts other than those of the District of Columbia is limited by Art. III, but as to the latter, it has been granted a power additional to that conferred by Art. III. This recognition further appears from the following statement of the court (same page):

> "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, *which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere.* The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable." (Emphasis ours.)

The court further evidenced the distinction to be drawn between the power of Congress over courts of the District of Columbia and other Federal courts of the country. In discussing the former, the court stated (page 547):

> "* * * that it drew its power from the same source, even though it was necessary it should have recourse to another provision of the Constitution in order to clothe the courts at the seat of government with other and additional authority not permissible under article 3."

It is also pertinent to keep in mind that the 1940 amendment does not confer only a benefit or right upon the citizens of the District of Columbia. It also imposes a burden in that they may become defendants as well as plaintiffs in diversity cases. Of greater importance is the fact that the reach of its terms is not confined to the citizens of the District of Columbia but includes with equal effect the citizens of all the States. It is hardly conceivable that Congress, broad as its powers may be with reference to the District of Columbia, can under the claim of exercising such powers legislate for the entire nation. Especially is this so concerning the judiciary, where its power is expressly limited by Art. III.

The argument that the citizens of the District of Columbia are entitled to the same rights and privileges as those of the States, including that provided by the amendment with which we are now concerned, is appealing, but it is of little if any consequence relative to the question with which we are now confronted. In response to a similar argument, the court in *Feeley* v. *Sidney S. Schupper Inter-State Hauling System, supra,* stated (page 667):

> "The District of Columbia, by reason of its being the seat of the national government and under the exclusive jurisdiction of Congress by Art. I, Section 8, Clause 17, is totally unlike any other governmental area in our union. It is not like a State. It is not like a territory. It is an area that is in a class by itself. Its anamalous position has been repeatedly recognized by the Courts. [Citing cases.] The prima facie discrimination against residents of the District, therefore, loses substance when it is considered in the light of a wholly exceptional situation, created by the framers of the Constitution out of necessity for a national

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capitol, from whose very nature flow many unusual consequences."

We conclude that the power of Congress over the inferior Federal courts of the country other than those of the District of Columbia (and perhaps certain territories) is limited to that conferred by Art. III of the Constitution. It follows that Congress in the enactment of the 1940 amendment exceeded its power and that the amendment is unconstitutional.

The judgment is therefore reversed and remanded, with directions that the District Court remand the cause to the State court from which it was removed.

Evans, *Circuit Judge*, dissenting. Convinced that a court must give heed to the results which its construction of a contract, a statute, or a Constitutional provision provokes*, I have been made to pause before joining in the majority opinion, which I must admit has convincing and somewhat persuasive qualities, to say nothing of the highly favorable reaction which arises from the fact that it is the mature judgment of my respected brethren. That result, however, leaves such a sour taste, it is so contrary to the practice of the forefathers to deal differently with one group of citizens than with another, that I not only pause but must reject forthwith any construction which would attribute to the founders an intent to treat a large part of our population—now nearly a million—so as to deny them what is given to all other citizens in other states.

I can not attribute any such intent to them.

The construction of the majority must be accepted, if at all, solely on the ground of oversight by the framers of Article III. As to that view, the outstanding thought is that no construction of the Constitution should be adopted

* *Faitoute Co. v. Asbury Park*, 316 U. S. 502
"The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' * * Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights. * * The dividing line will remain obscure if we deal with empty abstract rights instead of worldly gains and losses, if we indulge in doctrinaire talk about 'rights' and 'remedies', instead of giving these concepts a content that carries meaning to the understanding of men. * * To call a law so beneficent in its consequences on behalf of the creditor who, having had so much restored to him, now insists on standing on the paper rights that were merely paper before this resuscitating scheme, an impairment of the obligation of contract is indeed to make of the Constitution a code of lifeless forms instead of an enduring framework of government for a dynamic society."

which attributes to silence or failure to specifically mention a group, controlling weight, over a clear intention to treat all alike.

The entire scheme of the Federal Government as the finished Constitution bespeaks, is equality of the citizen. The two dominating thoughts that run throughout its length and breadth, and through all the debates leading to its final adoption, are (a) the supremacy of the citizen, and (b) the equality of the citizens.

The majority opinion denies to the citizen of the District of Columbia a right which the citizen of every state in the Union enjoys. He may not sue in a Federal Court on the basis of diversity of citizenship to protect his rights, if he be a citizen of the District of Columbia. Of all the territories in which to deny a citizen that right, the District of Columbia seems to me to be the most illogical and unjustifiable.

Is such a conclusion necessary from the language used in Section 2, Article III? Perhaps I should state the question—Is such a conclusion unavoidable from said language? I believe the Supreme Court must so construe it before we inferior Federal Courts should so hold.

Let us first turn to the judicial precedent. Our first case controls, if it be in point. It was decided by the Supreme Court. Justice Marshall spoke for the Court. That alone is sufficient to paralyze any doubting Thomas unless he can distinguish it. If it may not be distinguished, my argument vanishes.

In that case of *Hepburn* v. *Ellzey*, 2 Cranch 445, we are met by a holding which it seems to me is distinguishable.

There the Supreme Court was passing upon an *Act* of Congress which gave "jurisdiction to the circuit courts in cases between a citizen of the *state* in which the suit is brought, and a citizen of another *state*."

Chief Justice Marshall said:

> "The question * * is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the *Act of Congress* describing the jurisdiction of that court. That act gives jurisdiction to the Circuit Courts in cases between a citizen of the state in which the suit is

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brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state." * * as the act of Congress obviously uses the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the states contemplated in the Constitution.

"The House of Representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative. The Senate of the United States shall be composed of two senators from each state. Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word state is used in the Constitution as designating a member of the Union, * *. When the same term which has been used plainly in this limited sense, in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

"*It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed upon them. But this is a subject for legislative,* not for judicial *consideration.*"

Since Marshall wrote this opinion, Congress has spoken. The legislative branch to which he referred has dealt with the subject. We have the "*legislative* consideration" in the form of a new Act here under consideration. In the Ellzey case, the Congressional Act held not to grant the District of Columbia citizens recourse to the Federal court, was couched in the same limited phraseology as the Constitution, i. e., "citizens of different *states.*" Now Congress has become specific and included citizens of territories *and the District of Columbia.* No longer need we lament the unfairness of an Act which makes our courts open to "aliens" and "closed" to citizens of the District of Columbia.

Unfortunately, after a study of this case we find we have only transferred our inquiry, and our doubts, from the question before us to an inquiry as to what Justice Marshall meant when he wrote the last sentence of that opinion, "But this is a subject for *legislative*, not for judicial consideration." What did he mean when he used the word "legislative"? Did he intend that "legislative" required an amendment to the Constitution, or just an Act of Congress? Have we not here quite as great uncertainty as if he had not spoken?

Various courts seem to have refused to accept the Ellzey case as conclusively controlling, and language is used which favors the upholding of the statute. The Federal courts which have passed directly on this question have divided*— those denying the constitutionality are in the majority, I am told (7-2). No Circuit Court of Appeals has heretofore been presented with the question.

The subject has interested another group of students to whose opinion I am prone to give weight. I refer to the law writers in the Law School Journals of the Universities. They have spoken quite strongly in favor of the constitutionality of the Act and quite righteously against a result so contrary to their sense of fairness, as would follow a holding of unconstitutionality **.

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* Holding Act Unconstitutional:
Feeley v. *Schupper System*, 72 F. Supp. 663 (Md.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (S. C.); *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (Pa.); *Federal Deposit Ins. Corp.* v. *George-Howard*, 55 F. Supp. 921 (Md.) Rev. 153 Fed. 2d 591 (CCA8), Cert. Den. 329 U. S. 719; *Behlert* v. *James Foundation*, 60 F. Supp. 593 (Mass.); *Willis* v. *Dennis*, 72 F. Supp. 853 (Va.).
Holding Act constitutional:
Winkler v. *Daniels*, 43 F. Supp. 265 (Va.); *Glaeser* v. *Acacia Mutual Assn.*, 55 F. Supp. 925 (Cal.).

** 55 Yale Law Journal 600. The constitutionality of the 1940 Extension of Diversity Jurisdiction:
"In 1933, in *O'Donoghue* v. *United States*, there appeared the first crack in the doctrine that the constitutional courts could receive jurisdiction only of the cases and controversies enumerated in Article III, Section 2. • • • Therefore, the corollary of the limitation doctrine—namely that a court having jurisdiction of cases not enumerated in Article III, Section 2 cannot be a constitutional court—was contravened by the holding of the O'Donoghue case."
5 Louisiana Law Review 478:
"The Virginia court's decision here has the effect of saying that a grant of jurisdiction to the federal courts need not be expressly found in the judiciary article, but may be impliedly found in any other article of the Constitution. • • •
"Nevertheless, whether the reader agrees with the liberal decision handed down by the Virginia court, he must agree that this result is the

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I give a few reasons for my conclusion.

(1) A determination of unconstitutionality should be avoided if at all possible. "When the validity of an Act of Congress is drawn in question, and even if a serious

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only just and equitable one. Why should not a citizen of the District of Columbia be allowed the same privileges as a citizen of any state in suing and being sued in a federal court except for the reason that the framers of the Constitution did not provide for it?

"One can only speculate as to what the Supreme Court will hold when it has occasion to pass on this amendment. In view of past jurisprudence, it would seem that the amendment's constitutionality is doomed; however, with the liberal court which we have today, there is a good chance that the statute will be upheld. Undoubtedly the result reached by a decision upholding it would be just; but the question that presents itself in the writer's mind is whether the result will justify the means. Such reasoning could have the effect of extending the jurisdiction of the federal court far beyond its present bounds."

29 Georgia Law Review 193. Diversity of Citizenship Clause Extended. James A. McKenna, Jr.:

"If a numerical recapitulation were made of the instances in which the word "state" has been considered as including the District of Columbia and the territories and in the instances in which it has not, undoubtedly the former would be the larger of the totals. It is not suggested that a numerical superiority should be the controlling factor in a determination of this matter. However, it is indicative that the Supreme Court has not been concerned with consistency in interpreting this phase of the Constitution. Such a conclusion is submitted merely as an indication that the result of *Hepburn* v. *Ellzey* could very well be the subject of a judicial revision.

"The mere fact that the Constitution expressly guarantees this right to citizens of the states only in no way prohibits Congress from extending the same privilege to others who are not technically citizens of a state. Citizens of the District of Columbia and the territories are citizens of the United States, possessing the same burdens and obligations as all the other citizens.

"Despite doubts on the question of constitutionality, it is appropriate that Congress has seen fit to attempt to bring about this change. It has been long awaited, especially since the opinion in *Hepburn* v. *Ellzey*, the first case, seems to suggest that the condition was a peculiar one and that the legislature might do well to change it.

"Perhaps some of the delay has been caused by the belief that there were insurmountable constitutional obstacles in the way of reform, but it is odd that so fixed a notion has grown up in view of the express intimation of Chief Justice Marshall that the problem was one of Congressional intent rather than constitutional power."

11 George Washington Law Review 258:

"The incongruity of resorting to the fiction of holding the City of Bethlehem to be a 'citizen' of the Commonwealth of Pennsylvania for the purpose of satisfying a jurisdictional requirement of diverse citizenship and refusing, at the same time, to apply the fiction to the District of Columbia as a 'state' for the same purpose is quite evident, and a careful analysis of the cases supporting these opposite propositions fails to dispel the aura of arbitrariness which pervades them. * * *

"The Amendment of April, 1940, to the Judicial Code was there construed and upheld on the ground that the constitutional provision 'extending' jurisdiction to the federal courts in cases involving diversity of citizenship *was not framed in words of 'exclusion'* and that the power

doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question of constitutionality may be avoided." *Crowell* v. *Benson*, 285

of Congress to legislate for the District of Columbia could properly be employed to extend diversity jurisdiction to cases involving its citizens. * * *

"The manifest purpose of the constitutional provision conferring jurisdiction on the federal courts in cases involving citizens of different states was to secure the citizen against local prejudice which might injure him if he were compelled to litigate controversies in the tribunals of his adversary's state, * * *.

"It is evident that a more courageous and realistic approach to the question of the rights of citizens of the District of Columbia and the territories of Alaska and Hawaii to visit the fountains of federal justice by the same route which is open to citizens of the several states is requisite to give life and vigor to the principle of equality of privilege and freedom from discrimination which is the inalienable right of all citizens of the United States."

21 Texas Law Review 83. Federal Procedure—Diversity Jurisdiction—1940 Amendment.

"Granting this, however, an argument has been made that the District of Columbia and the territories should be included in the word 'states,' regardless of the past holdings that such citizens are not citizens of states. Certainly, in other connections, the Supreme Court has not attempted to be consistent in its construction of the word 'states,' and the numerical weight of cases favors the liberal construction.

"These recent developments, along with the older ones, evidence the breaking down of the strict barriers which originally divided the two kinds of courts, and furnish a basis upon which the Court may uphold the Amendment if it is willing so to extend diversity jurisdiction. As a matter of policy, there can be no real reason why citizens of the District of Columbia should not be on an equal footing with the rest of the nation."

21 Tulane Law Review 171. The 1940 Amendment to the Diversity of Citizenship Clause.

"It is clear that by the statute Congress intended to rectify that manifestly unjust situation. * * *

"The Supreme Court could meet the problem of constitutionality by holding that within the meaning of Article III, citizens of the territories and the District of Columbia are in fact 'citizens of states.'

"A more realistic approach would simply deny that Article III is the sole source of federal judicial power. It could be argued that the extension of diversity jurisdiction is a valid and reasonable exercise of the broad powers which the Constitution grants to Congress to legislate for the territories and the district of Columbia. This was the concept adopted by the Committee on the Judiciary of the House of Representatives in its report and was accepted by the courts in the Winkler and Glaeser cases. * * *

"As a matter of fact, it is clear that Marshall felt that there was no constitutional inhibition to the extension of diversity attempted by the 1940 amendment. For after decrying the necessity of the result of the Hepburn case under the provisions of the Judicial Code, he added, 'But this is a subject for legislative, not for judicial consideration.' It would be specious, to say the least, to argue that by 'legislative Consideration' Marshall envisaged an amendment to the Constitution. The statement can have but one meaning; Marshall felt that the Constitution allowed

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U. S. 22, 62; *Phelps* v. *U. S.*, 274 U. S. 341; *Russian Fleet* v. *U. S.*, 282 U. S. 481; *Panama R. Co.* v. *Johnson*, 264 U. S. 375; *U. S.* v. *Walter*, 263 U. S. 15; *Federation of Labor* v. *McAdory*, 325 U. S. 450.

I wonder if this is just a paper rule. If not, what factual situation determines its application? Is it invocable only in state courts to prevent justices of peace from holding acts unconstitutional? If applicable to Federal courts, is

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the revision of the diversity clause, either under a broad interpretation of Article III or by Authority of some other constitutional provision. It is significant that no reference is made to these words by Marshall in either the McGarry or the Behlert decisions.

"Whether it be justified under Article III or as legislation for the territories and the District of Columbia, the amendment obviously is dictated by the most basic considerations of justice. No argument has been made against the fairness of the extended provisions. It is to be hoped and expected, when the question is presented to the Supreme Court, that it will be resolved in favor of constitutionality. To do otherwise and adopt the literal and ritualistic attitude towards the Constitution which the District Courts followed in the McGarry and Behlert cases would be strongly inconsistent with the manner in which the Supreme Court throughout its history has reshaped and molded constitutional provisions to meet the changing requirements of the times.

"The 1940 amendment is a step towards remedying some of the obvious inequalities which exist in the present federal judicial system." XLVI Columbia Law Review 125:

"Since the question whether or not the District of Columbia is to be treated as a 'state' within the terms of the Constitution has not been uniformly decided, it would seem that such determination must be made in the light of the purpose and scope of the particular provision in question. Diversity of citizenship jurisdiction was granted to the federal courts to alleviate fears that suits brought by citizens of one state in the courts of another state would be adjudicated unfairly. It is clear that this purpose is equally applicable when the suit is brought by citizens of the District of Columbia. Thus, since it was early held that a citizen of the District is not a 'citizen of a state' under the Congressional act granting diversity jurisdiction to the federal courts, the 1940 amendment to the Judicial Code was enacted. Because of its beneficial nature, this statute should not be declared invalid unless it clearly transcends Congress' constitutional authority to legislate for the District.

"It may be argued that since the diversity provision has no negative implications, this statutory grant of diversity jurisdiction to the federal courts may be upheld under Article I, Section 8. However, the tenuous nature of this position becomes evident in the light of what appears to be the established rule of constitutional law that the scope and extent of the jurisdiction of the constitutional courts must emanate from Article III.

"It may also be maintained that Congress, in enacting the statute in the instant case, has, in effect, for purposes of diversity jurisdiction in the federal courts, vested the citizens of the District of Columbia with the character of a citizen of a state. Thus, if Congress can so characterize a citizen of the District, the diversity provision becomes applicable, whereupon the constitutionality of the statute can be sustained."

Also see 29 Georgetown Law Journal 193.

it effective only in the Supreme Court? Rather seriously, I ask why should the inferior Federal courts apply the rule when in the Supreme Court the question of constitutionality can seldom be determined by rules. It strikes me that the rule should either be applied or abandoned in inferior Federal courts.

(2) Rules of construction applicable alike to private contract, statute or constitution, require that if there be inconsistency between two parallel provisions, one general and one specific, the specific shall control. Generalia specialibus non derogant.* "Words of a constitution are not to be read with stultifying narrowness." *U. S.* v. *Classic*, 313 U. S. 299.

(3) The specific constitutional provision here involved gives Congress all inclusive power of legislation over the District of Columbia. Art. 1, Sec. 8, Clause 17. *Lockerty* v. *Phillips*, 319 U. S. 187.

(4) A broad construction of the judiciary provisions of the Constitution weakens if it does not destroy any asserted inconsistency between the two provisions. * *

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* Stated in another way, "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other * *" (*Billings* v. *U. S.*, 232 U. S. 261, 282.) "Fundamental constitutional principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other." (*Dick* v. *U. S.*, 208 U. S. 340.)

** There is very plausible ground for saying that the enumeration of subject matter of jurisdiction of the Federal Judiciary is not *limited* to the items there enumerated—rather such enumeration lists the matters which the Constitution's framers required Federal Courts to take jurisdiction of. In *Kansas* v. *Colorado*, 206 U. S. 46, it was said:

"It is a definite declaration, a provision that the judicial power shall extend to—*that is, shall include*—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, *but if there are any they must be expressed*, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising. * * *

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, *no matter who may be the parties thereto.*"

See also *Lockerty* v. *Phillips*, 319 U. S. 182, 187: "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the

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(5) There is no logical or rational basis for discriminating against the citizens of the District of Columbia barring them from recourse to the Federal Court based on diversity of citizenship grounds.

(6) While "fundamental" lack of jurisdiction is always assertable, I suffer from pangs of doubt over appellant's right to assert a lack of jurisdiction for the first time on this appeal, for it chose the forum and based jurisdiction on the diversity of citizenship. It transferred the case from State to Federal Court basing jurisdiction on diversity of citizenship, and only after defeat in the Federal Court and after appeal to this court did it assert a lack of jurisdiction of Federal Court because plaintiff was a resident of the District of Columbia. These pangs of doubt have grown somewhat as I studied cases that seemed to place more weight on the reasons back of estoppel than on precedents. The doctrine of estoppel perhaps is, but should be, no respector of causes, but just an old-fashioned common sense defense founded on appealing equitable reasons.

I believe that defendant is estopped to assert the unconstitutionality of the statute. I base this conclusion on the decision of the court in the case of *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 598. That opinion in part reads:

> "*It* is, however, *contended that the act is*, in all of its parts, *unconstitutional and void.* The grounds upon which the plaintiff rests this contention are: that the act makes no provision by which compensation for property taken under it can be constitutionally adjusted and determined; that it does not provide for the ascertainment of such compensation by the verdict of a jury; *that it compels the plaintiff to have recourse to the Court of Claims, which is a court unknown to the Constitution*, being neither a court of equity such as was known at the adoption of that instrument, nor a court of law proceeding according to the rules of the common law, but only a board of referees, constituted

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exercise of the authority to" ordain and establish inferior courts, conferred on Congress by Act III, Sec. I, of the Constitution. * * * The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good."

by one party to hear such cases as another party will consent to submit to its determination, and without power to enforce its judgment against the party by whom it is created; and that it directs property to be taken and the owner thereof dispossessed, without making provision for just compensation.

"*These are questions of much interest* * *. But this opinion need not be extended for the purpose of such an examination; * * for the questions propounded are not material in the determination of the present case. *They have become immaterial by the act of the plaintiff in instituting suit against the United States in the Court of Claims.* * * By the same act it has estopped itself from suggesting that no judgment obtained in the Court of Claims can be enforced against the United States."

Also I find comfort in *Skinner* v. *Franklin County*, 179 F. 862, (C. C. Ill.) where it was held

"It is contended by the defendant, however, that case can have no application in this case, for the reason as argued by counsel, that the court had no jurisdiction of Pinckney, nor of the bonds then owned by him, and now involved in this suit; that the statute of Illinois by which unknown bondholders were made parties, and service thereon had by notice by publication is invalid as in contravention of the Constitution, in that it deprived Pinckney of his property without due process of law. Without attempting to reproduce the argument by which this proposition is sought to be maintained, or that by which it is claimed to be refuted, I merely pass it with the observation that defendant invoked the jurisdiction prima facie conferred by the statute, and, having obtained a different result than expected, is in no position to question its own voluntary action or proceeding instituted by it, where, had Pinckney appeared in fact, and by proper amendment been made party by name, there would now be no ground upon which to rest the argument now insisted upon by the defendant."

Coming to the merits, it strikes me that we are on debatable ground over the word "state". The word "state" may well have included something other than the government of a people in a territory. It may have meant the

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territory, which includes the people therein. It may have included one or a plurality of commonwealths and it may have been intended to include more than one meaning,—more than the territory and the government by which people therein are governed. I think it was most frequently used, and was in this section, to mean the *people* who make and enforce the laws of any given territory. It would seem more natural to apply it to the people whose rights, and whose form of government, were the dominant subject of consideration by those who were writing the Federal Constitution.

In the Constitution the word "state" is used more than forty times. I do not think it is logical to limit the meaning in this section if thereby an intention to discriminate between citizens, which idea is so foreign to the rest of the Constitution, results.

The founders were establishing the framework of a Government which would prove its greatness in the future. Doubtless they knew well and were satisfied with their present strength, but it was the future which beckoned. Many of them had glimpsed visions of the republic that was to be along the banks of the Ohio and the Mississippi.

Would they be giving a narrow meaning to the word "state"? Would they distinguish between citizens of one locality and another?

The designation of the area as a territory came later. They were laying the foundation that would meet an expanding population. They were providing for an ambitious, ceaselessly growing nation. It was not within their ken or visions to plan for a country or government that was to remain static.

When providing for the important judiciary branch they enjoyed a broad horizon. They were providing tribunals wherein the citizen could protect and vindicate his rights and the foremost one was the right to be treated on terms of equality, when it came to the citizen's property, his life, his liberty or the pursuit of happiness.

Such a conception completely nullifies any construction of the word "state" in this section which would limit it to a territorial subdivision already in existence. The judiciary, like the executive and legislative, was to grow in importance with the years. The framers, however, meant

to lay the foundation upon which it should grow. That foundation was, I repeat, equality of citizens. The courts were the place where that equality could be vindicated. Impossible is the thought that they started out by closing the doors to any group or make admittance to said courts' protection dependent upon where said citizen dwelt. This impossible construction can be avoided if we ascribe to the word "state" a meaning of citizens in a geographical subdivision, such as a territory or the District of Columbia.

The contention that the word "state" as used in the Constitution excludes the District of Columbia, would have greater weight if that word were not used so many times in the Constitution. Whether the same word in two statutes means the same thing depends on whether the statutes are in pari materia. (*United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369.) For like reasons, the framers of the Constitution may well have had a somewhat different meaning in mind when using this word "state." For example, the citizen of the District of Columbia was subject to taxation because he came within the group defined by the act. *Heald* v. *District of Columbia*, 259 U. S. 114.

Unquestionably the fact that the courts have decided that a citizen of the District of Columbia can not vote because not included in the group, must be viewed as favoring the narrower construction of this word. It, however, should have no more weight than the decision which subjected the citizens of the District of Columbia to its tax enactment. Moreover, I find it difficult to reconcile the majority decision in the Myers case (272 U. S. 52) with the decision in *Kansas* v. *Colorado*, 206 U. S. 46.

It is rather hard to believe that the framers of the Constitution did not intend to confer upon the Federal District Court, jurisdiction of all common law actions, and certainly they would not, if restricting jurisdiction to diversity of residence of litigants, have made it depend on residence in particular localities.

Considering the general scheme and purpose of the Constitution, a broad and uniform jurisdiction of the Federal Courts would be the logical objective of the framers.

I am not arguing for a wide open scope of jurisdiction in this case. It is not necessary. I do believe it might well have been argued before the question became settled

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by judicial decision, not now subject to review. Few of us would care to repeat the upsetting effect of *Erie* v. *Tompkins*, 304 U. S. 64, even though a sturdy conviction concerning the general scheme and framework of the Constitution suggests that logically the said framers intended to give the Federal Courts jurisdiction of all common law actions. Far from holding such a broad jurisdiction, all that is needed here is to hold that by this section of the Constitution, the founders gave to Federal Courts, jurisdiction where litigants were from different territorial subdivisions called states.

I will not discuss the added reason for my conclusion, namely the specific grant of power to Congress, found in Art. I, Sec. 8.

In conclusion, I would hold the Act in question to be constitutional even if the doubts which I entertained were more substantial than they are. I would not declare an Act unconstitutional in so important a statute, where there was serious doubt, but would leave to the Supreme Court, that decision.

Also, I would say that in this case the appellant should be estopped from asserting the objection.

And on the same day, to-wit, on the twelfth day of December, 1947, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Friday, December 12, 1947.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Central States Cooperatives, Inc., *Plaintiff-Appellee,*		Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
9291	*vs.*	
Watson Bros. Transportation Company, Inc., *Defendant-Appellant.*		

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court with directions to remand the cause to the State Court from which it was removed.

And afterwards, to-wit, on the twenty-seventh day of December, 1947, there was filed in the office of the Clerk of this Court a petition for rehearing which said petition for rehearing is not copied here.

And afterwards, to-wit, on the seventh day of January, 1948, there was filed in the office of the Clerk of this Court an answer to the petition for rehearing which said answer to petition for a rehearing is not set forth here.

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And afterwards, to-wit, on the eighth day of January, 1948, there was filed in the office of the Clerk of this Court a petition to certify propositions of law to the Supreme Court of the United States which said petition to certify propositions of law is not set forth here.

And afterwards, to-wit, on the tenth day of January, 1948, there was filed in the office of the Clerk of this Court a brief in support of the petition to certify propositions of law to the Supreme Court of the United States which said brief in support is not set forth here.

And afterwards, to-wit, on the thirteenth day of January, 1948, there was filed in the office of the Clerk of this Court an answer and objection of petition to certify propositions of law to the Supreme Court of the United States, which said answer and objection are not set forth here.

And on the same day, to-wit, on the thirteenth day of January, 1948, there was filed in the office of the Clerk of this Court a brief in opposition to the petition to certify the proposition of law to the Supreme Court of the United States, which said brief in opposition is not set forth here.

And afterwards, to-wit, on the twentieth day of January, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, January 20, 1948.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Central States Cooperatives, Inc., *Plaintiff-Appellee,* *vs.* Watson Bros. Transportation Company, Inc., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
9291	

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit, on the twenty-first day of January, 1948, there was filed in the office of the Clerk of this Court a notice and petition for stay of mandate which said notice and petition are in the words and figures following, to-wit:

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9291

Central States Cooperatives, Inc.,
Plaintiff-Appellee,

vs.

Watson Bros. Transportation Company, Inc.,
Defendant-Appellant.

Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division.

Honorable Elwyn R. Shaw, District Judge.

NOTICE.

To: Julius L. Sherwin and Theodore R. Sherwin,
209 S. La Salle St., Chicago,
Attorneys for defendant-appellant.

Please Take Notice that on Wednesday the 21st day of January, 1948, we will file in the Clerk's office of the United States Circuit Court of Appeals, for the Seventh Circuit, a petition praying a stay of mandate of this court upon its judgment in this cause, pending the preparation and filing of a petition for certiorari in the Supreme Court of the United States.

Thomas G. McBride and
S. L. Brenner,
By Thomas G. McBride,
Attorneys for Plaintiff-Appellee.

Received a copy of the above notice, together with a copy of said petition, this 21st day of January, 1948.

Theodore R. Sherwin,
Julius L. Sherwin,
Attorneys for Defendant-Appellant.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9291.

Central States Cooperatives, Inc.,
Plaintiff-Appellee,

vs.

Watson Bros. Transportation Company, Inc.,
Defendant-Appellant.

Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division.

Honorable Elwyn R. Shaw, District Judge.

PETITION FOR STAY OF MANDATE.

To the Honorable Justices of the United States Circuit Court of Appeals, for the Seventh Circuit:

Your petitioner, Central States Cooperatives, Inc., plaintiff and appellee in the above entitled cause, hereby respectfully states that it desires to file its petition in the Supreme Court of the United States for a writ of certiorari to review the judgment of this court in the above entitled cause; that it intends to file the said petition for certiorari within the thirty days time allowed by law and the rules therefor.

Your petitioner, therefore, respectfully prays that an order may be entered herein staying the mandate of this court upon its judgment in this cause pending the preparation and filing of said petition for certiorari.

Respectfully submitted,
Central States Cooperatives, Inc.,
Plaintiff-Appellee,

By Thomas G. McBride and
S. L. Brenner,
By Thomas G. McBride.

Thomas G. McBride,
Of Counsel.

Endorsed: Filed Jan. 21, 1948. Kenneth J. Carrick, Clerk.

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And on the same day, to wit, on the twenty-first day of January, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, January 21, 1948.

Before:

Hon. J. Earl Major, Circuit Judge.

Central States Cooperatives, Inc., *Plaintiff-Appellee,*		Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
9291	*vs.*	
Watson Bros. Transportation Company, Inc., *Defendant-Appellant.*		

On petition of counsel for the Plaintiff-Appellee, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of thirty (30) days, pursuant to Rule 25 of the Rules of this Court.

And afterwards, to-wit, on the twenty-second day of January, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, January 22, 1948.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Central States Cooperatives, Inc., *Plaintiff-Appellee,* *vs.* Watson Bros. Transportation Co., Inc., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
9291	

It is ordered by the Court that the petition of counsel for the plaintiff-appellee, filed herein on January 8, 1948, for certification of questions to the Supreme Court of the United States be, and the same is hereby, denied.

And afterwards, to-wit, on the thirtieth day of January, 1948, there was filed in the office of the Clerk of this Court a notice and designation of record by plaintiff-appellee, which said notice and designation are in the words and figures following, to-wit:

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 9291.

Central States Cooperatives, Inc., *Plaintiff-Appellee,* *vs.* Watson Bros. Transportation Co., Inc., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. — Honorable Elwyn R. Shaw, District Judge.

NOTICE.

To: Julius L. Sherwin and Theodore R. Sherwin,
209 South La Salle Street,
Chicago, Illinois,
Attorneys for Defendant-Appellant.

Please Take Notice that on Friday the 30th day of January, A. D. 1948, we will file in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit, a Designation of Record by Plaintiff-Appellee, copy of which is herewith served upon you.

S. L. Brenner and
Thomas G. McBride,
Attorneys for Plaintiff-Appellee.
By Thomas G. McBride,

Received a copy of the above and foregoing notice, together with a copy of the Designation of Record by Plaintiff-Appellee, therein referred to, this 30th day of January, A. D. 1948.

Theodore R. Sherwin,
Julius L. Sherwin,
Attorneys for Defendant-Appellant.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 9291

Central States Cooperatives, Inc., *Plaintiff-Appellee,* *vs.* Watson Bros. Transportation Co., Inc., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Elwyn R. Shaw, District Judge.

DESIGNATION OF RECORD BY PLAINTIFF-APPELLEE.

Now comes Central States Cooperative, Inc., plaintiff-appellee, by Thomas G. McBride and S. L. Brenner, its attorneys, and hereby designates the following portion of the record and proceedings in the Circuit Court of Appeals for the Seventh Circuit in the above entitled cause and requests the Clerk to prepare a transcript of such portion of the record for filing in the Supreme Court of the United States:

Description	Date of Filing
Transcript of Record	February 1, 1947
Appearance of Watson Bros. Transportation Co., Inc., defendant-appellant	February 1, 1947
Appearance of Central States Cooperatives, Inc., plaintiff-appellee	February 6, 1947
Notation referring to filing of:	
Appellant's Brief	June 9, 1947
Appellee's Brief	June 30, 1947
Reply Brief	July 30, 1947
Notice and motion of Watson Bros. Transportation Co., Inc., to reverse and remand (not including brief)	September 23, 1947

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Notation referring to filing of Appellee's Brief in opposition to Appellant's motion of September 23, 1947 — October 15, 1947

Order of Court denying Motion of September 23, 1947 to reverse and remand — October 30, 1947

Notation referring to filing of:

- Appellant's Brief in support of motion to reverse and remand — November 10, 1947
- Appellee's Supplemental brief in opposition — November 28, 1947

Opinion by Judge Major and Judge Evans dissent — December 12, 1947

Notation referring to filing of:

- Petition for Rehearing — December 27, 1947
- Answer to Petition for Rehearing — January 7, 1948
- Petition to Certify propositions of law to United States Supreme Court — January 8, 1948
- Brief in support of Petition to certify propositions of law to United States Supreme Court — January 10, 1948
- Answer and Objection of Petition to certify propositions of law to the United States Supreme Court — January 13, 1948
- Brief in opposition — January 13, 1948

Order of court denying Petition for rehearing — January 20, 1948

Order of court denying Petition to certify propositions of law to the United States Supreme Court — January 22, 1948

Notice and petition for stay of mandate — January 21, 1948

Order of court staying mandate — January 21, 1948

Central States Cooperatives, Inc.,
Plaintiff-Appellee.

By S. L. Brenner and
Thomas G. McBride,
By Thomas G. McBride,

Thomas G. McBride,
Of Counsel.

Endorsed: Filed Jan. 30, 1948. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed in this Court made in accordance with the plaintiff-appellee's designation of record filed in this Court on the thirtieth day of January, 1948, in

Cause No. 9291

Central States Cooperatives, Inc.,
Plaintiff-Appellee,

vs.

Watson Bros. Transportation Company, Inc.,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of February, A. D. 1948.

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. [redacted]43

CENTRAL STATES COOPERATIVES, INC.,
a corporation,
Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY,
INC., a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS G. McBRIDE,
100 N. LaSalle Street,
Chicago, Illinois,

GEORGE E. BILLETT,
38 S. Dearborn Street,
Chicago, Illinois,
Counsel for Petitioner.

SUBJECT INDEX.

PAGE

Petition:

I. Statement of Matter Involved 1
(a) The Questions 1
(b) The Proceedings 3
II. Basis for Jurisdiction of this Court 5
III. Reason for Granting the Writ 6
IV. Prayer 10

Brief:

I. Opinion of the Court Below 11
II. Jurisdiction of This Court 11
III. Statement of the Case 12
IV. Specification of Errors 13
V. Summary of Argument 14

Argument 18
Point 1 A 18
Point 1 B 38
Point 1 C 40
Point 2 54
Point 3 60
Point 4 76
Point 5 79

Conclusion 93

TABLE OF CASES CITED.

Arroyo v. Puerto Rico Transportation Authority, 162 F. 2d 748 ..... 9, 26

Atchison Topeka & Santa Fe Ry. Co. v. Sowers, 213 U. S. 55, 29 S. Ct. 397, 53 L. Ed. 695 48

Banker's Trust Co. v. Texas & Pacific Ry., 241 U. S. 295, 36 S. Ct. 569, 60 L. Ed. 1010 19

Barney v. City of Baltimore, 73 U. S. (6 Wall.) 280 18 L. Ed. 825 ..... 19, 73, 80

Battle v. United States, 209 U. S. 36, 28 S. Ct. 422, 52 L. Ed. 670 43

Behlert v. James Foundation of New York, 60 F. Supp. 706, (D. C. S. D. N. Y. 1945) 8

Billings v. United States, 23 U. S. 261, 282, 34 S. Ct. 421, 58 L. Ed. 596 ..... 52, 82

Brooklyn Sav. Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 6

Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542 78

Busby v. Electric Utilities Employers Union, 323 U. S. 72, 89 L. Ed. 78, 65 S. Ct. 142 85

Callan v. Wilson, 127 U. S. 540, 550, 8 S. Ct. 1301, 32 L. Ed. 223 ..... 68, 83

Capital Traction Co. v. Hof, 174 U. S. 1, 5, 13-16, 19 S. Ct. 580, 43 L. Ed. 873 ..... 22, 58

Chesbrough v. Woodworth, 244 U. S. 72, 37 S. Ct. 579, 61 L. Ed. 1000 78

In re: Chicago R. I. & P. Ry. Co., 72 F. 2d 443 (CCA 7th) 39

BLEED THROUGH – POOR COPY

Cinema Patents Co. v. Columbia Pictures Corp., 62 F. 2d 310, (CCA 9th 1932) 39

Clark v. City of Peoria, 13 Fed. 561 (C. C. Ill. 1882) 19

Cohens v. Virginia, 19 U. S. (6 Wheat.) 264, 378-380, 381, 384, 415, 416, 424, 428, 5 L. Ed. 257 ..... 28, 31, 40, 55, 77, 82

Corfield v. Coryell, (C. C. Pa. 1823) 4 Wash. C. C. 371, Fed. Cas. No. 3,230 62

Cowles v. Mercer County, 74 U. S. (7 Wall.) 118, 19 19 L. Ed. 86 ..... 87, 88

Cunningham v. Ralls County, 1 Fed. 453 (C. C. E. D. Mo. 1880) 88

Curry v. District of Columbia, 14 App. D. C. 423, 438 60

Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229 6

Dick v. United States, 208 U. S. 340, 28 S. Ct. 399, 52 L. Ed. 520 ..... 53, 82

District of Columbia v. Murphy, 314 U. S. 441, 62 S. Ct. 303, 86 L. Ed. 329 25

Draper's Executors v. Gorman, 35 Va. 628 46

Duze v. Woolley, 72 F. Supp. 422 (D. C. Hawaii 1947) 8

Embry v. Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346 ..... 46, 70, 71, 83

Faitoute Co. v. Asbury Park, 316 U. S. 502, 62 S. Ct. 1129, 86 L. Ed. 1629 81

Federal Deposit Insurance Corp. v. George-Howard, 153 F. 2d 591 (CCA 8th 1946) 8

Federal Deposit Insurance Corp. v. George-Howard, 55 F. Supp. 921 (D. C. W. D. Mo. 1942), reversed 153 F. 2d 591 (CCA 8th 1946) 9, 26

Federal Reserve Bank of Richmond v. Kalin, 77 F. (2d) 50 (CCA 4th 1935) 26

Feeley v. Sidney S. Schupper Inter-State Hauling System, 72 F. Supp. 663 (D. C. D. Md. 1947) 8

Gay v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099 6

Geofroy v. Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642 83

Glaeser v. Acacia Mutual Life Association, 55 F. Supp. 925 (D. C. N. D. Cal. 1944) 8

Gudmundson v. Cardillo, 126 F. 2d 521, 525 60

Gully v. First National Bank, 299 U. S. 109, 112, 57 S. Ct. 96, 81 L. Ed. 70 37

Haavik v. Alaska Packers Assn., 263 U. S. 510, 44 S. Ct. 177, 68 L. Ed. 414 68

Hanley v. Kansas City Southern Ry., 187 U. S. 617, 23 S. Ct. 214, 47 L. Ed. 333 83

Heald v. District of Columbia, 259 U. S. 114, 124, 42 S. Ct. 434, 66 L. Ed. 852 ..... 84, 89

Healy v. Sea Gull Specialty Co., 237 U. S. 479, 35 S. Ct. 658, 59 L. Ed. 1056 39

Henry v. A. B. Dick Co., 224 U. S. 1, 32 S. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913 D, 880 39

Hepburn v. Ellzey, 6 U. S. (2 Cranch) 445, 452 2 L. Ed. 332 ..... 19, 73, 79, 89, 90

Herron v. Southern Pac. Ry. Co., 283 U. S. 91, 95, 51 S. Ct. 383, 75 L. Ed. 857 22

Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 90 L. Ed. 6

Hooe v. Jamieson, 166 U. S. 395, 17 S. Ct. 596, 41 L. Ed. 1049 ..... 19, 73, 80

BLEED THROUGH – POOR COPY

Hoover v. Crawford County, 39 Fed. 7 (C. C. Ark. 1889) 88

Interstate Commerce Com. v. Brimson, 154 U. S. 447, 468, 14 S. Ct. 1125, 38 L. Ed. 1047..... 40

Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956 .....53, 82

Kendall v. United States, 37 U. S. (12 Pet.) 524, 9 L. Ed. 1181..... 57

Keller v. Potomac Electric Power Co., 261 U. S. 428, 442, 43 S. Ct. 445, 67 L. Ed. 731..... 58

Kerr v. Ross, 5 App. D. C. 241, 247..... 59

Lamar v. United States, 240 U. S. 60, 65, 36 S. Ct. 255, 257, 60 L. Ed. 526..... 87

Lansburgh v. District of Columbia, 11 App. D. C. 512, 521 59

In re Lennon, 166 U. S. 548, 553, 17 S. Ct. 658, 41 L. Ed. 1110 37

Lilly v. Grand Trunk Western R. Co., 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411..... 6

Lincoln County v. Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766..... 87

Lincoln Gas & Electric Light Co. v. City of Lincoln, 250 U. S. 256, 39 S. Ct. 454, 63 L. Ed. 968..... 78

Lockerty v. Phillips, 319 U. S. 182, 187, 63 S. Ct. 1019, 87 L. Ed. 1339..... 52

Logan v. United States, 144 U. S. 263, 283, 293, 12 S. Ct. 617, 36 L. Ed. 429..... 75

Loughborough v. Blake, 18 U. S. (5 Wheat.) 317, 5 L. Ed. 98 89

Lucking v. Detroit & Cleveland Nav. Co., 284 F. 497, Aff. 1924, 265 U. S. 346, 44 S. Ct. 504, 68 L. Ed. 1047 40

McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 421, 4 L. Ed. 579 82

McGarry v. City of Bethlehem, 45 F. Supp. 385 (D. C. E. D. Pa. 1942) 8, 87

McPike v. Lincoln County, 7 Cent. L. J. 264 87

Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 9, 10 S. Ct. 19, 33 L. Ed. 231 ..... 64, 83, 85

The Moses Taylor, 71 U. S. (4 Wall.) 411, 428, 18 L. Ed. 397 77

Moses v. United States, 16 App. D. C. 428, 433 59

Moss v. United States, 23 App. D. C. 475, 481-3 71

National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co., Inc. of Virginia, 165 F. 2d 531, 536 ..... 8, 9, 50

Nebbia v. New York, 291 U. S. 502, 523, 54 S. Ct. 505, 78 L. Ed. 940 62

Neild v. District of Columbia, 110 F. 2d 246, 249 59, 83, 84

New York v. Miln, 71 Pet. 102, 139, 9 L. Ed. 648 61

O'Donoghue v. United States, 289 U. S. 516, 538, 539-540, 53 S. Ct. 740, 77 L. Ed. 1356 ..... 66, 69

Old Colony Trust Co. v. Commisioner of Internal Revenue, 279 U. S. 716, 49 S. Ct. 499, 73 L. Ed. 918 36

Osborn v. Bank of United States, 22 U. S. (9 Wheat.) 738, 818-823, 6 L. Ed. 204 33

BLEED THROUGH – POOR COPY

Ostrow v. Samuel Brillant Co., 66 F. Supp. 593 (D. C. D. Mass. 1946) 8

Pannill v. Roanoke Times Co., 252 Fed. 910 19

Patton v. United States, 281 U. S. 276, 288, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263 22

Paul v. Chilsoquie, 70 Fed. 401 (C. C. Ind. 1895) 19

Paul v. Virginia, 75 U. S. (8 Wall) 168, 19 L. Ed. 357 (1869) 88

Pembina Consol. Min. Co. v. Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650 88

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Polk's Lessee v. Wendell, 18 U. S. (5 Wheat.) 293, 5 L. Ed. 92 89

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Shoemaker v. United States, 147 U. S. 282, 300, 13 S. Ct. 361, 37 L. Ed. 170 61

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Starin v. New York, 115 U. S. 248, 257, 6 S. Ct. 28, 29 L. Ed. 388 35

Stein v. Fleischmann Co., 237 Fed. 679 19

Stoutenburgh v. Hennick, 129 U. S. 141, 147, 9 S. Ct. 256, 257, 32 L. Ed. 637 ..... 58, 83

Talbott v. Board of Silver Bow County, 139 U. S. 438, 444, 11 S. Ct. 594, 35 L. Ed. 599 84

Tennessee v. Davis, 100 U. S. 257, 264, 25 L. Ed. 648 36

The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 57 L. Ed. 716, 33 S. Ct. 410 39

Treinies v. Sunshine Mining Co., 308 U. S. 66, 71, 60 S. Ct. 44, 47, 84 L. Ed. 85 86

United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 ..... 52, 82

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United States v. Union Pacific Rd. Co., 98 U. S. 569, 602, 25 L. Ed. 143 25

Weiss v. Los Angeles Broadcasting Co., 163 F. 2d 313 40

Whelan v. N. Y. R. Co., 35 Fed. 849 89

Wight v. Davidson, 181 U. S. 371, 384, 21 S. Ct. 616, 45 L. Ed. 900 83

BLEED THROUGH – POOR COPY

Williams v. United States, 289 U. S. 553, 566, 53 S. Ct. 751, 77 L. Ed. 1372 83

Willis v. Dennis, 72 F. Sup. 853 (D. C. W. D. Va. 1947) 8

Wilson v. Guggenheim, 70 F. Supp. 417 (D. C. E. D. So. Car. 1947) 8

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Federal Jurisdiction—Constitutional Law, 11 George Washington Law Review 258 ..... 9, 87, 92

Federal Procedure—Diversity of Citizenship as Applied to Citizens of the District of Columbia and Territories, 5 Louisiana Law Review 478 ..... 9, 92

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The 1940 Amendment to the Diversity of Citizenship Clause, 21 Tulane Law Review 171.....9, 92

Washingtonians and Rumanians, Nebraska Law Review, March 1948.....9, 92

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Judicial Code, Sec. 48 (28 U.S.C.A. Sec. 109)..... 39

1 Stat. 73, Sec. 11, Act of September 24, 1789..... 19

1 Stat. 122 (1790), 28 U.S.C.A. 687 (1934) (Sec. 905 Rev. Stat.)..... 47

2 Stat. 298 (1804), 28 U.S.C. 688 (1934) (Sec. 906 Rev. Stat.) 47

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36 Stat. at L. 1093, Act of March 3, 1911, c. 23, Sec. 24, par. 19, 28 U.S.C.A. Sec. 41 (19)..... 26

BLEED THROUGH – POOR COPY

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54 Stat. 143 (1940), Sec. 24(1) Judicial Code, 28 U.S.C.A. Sec. 41(1) 1, 2, 5, 13, 18, 23, 40, 79, 89, 92

U. S. Rev. Stat., T. 13, ch. 17, sec. 905 47

Ill. Rev. Stat. (1947) Ch. 131, Sec. 1.14 83

UNITED STATES CONSTITUTION.

Art. I, Sec. 8 ..... 2, 28, 38, 74

Art. I, Sec. 8, Cl. 1 to 18 14

Art. 1, Sec. 8, Cl. 3, 4 and 8 83

Art. 1, Sec. 8, Cl. 9 2,74

Art. I, Sec. 8, Cl. 17 ..... 2, 13, 24, 26, 32, 41, 44, 48, 49, 52, 54, 60, 63, 64, 71, 75

Art. I, Sec. 8, Cl. 18 ..... 2, 13, 32, 48, 64, 74

Art. III, Sec. 2 ..... 3, 12, 13, 14, 24, 26, 32, 38, 41, 52, 72, 76, 79

Art. IV, Sec. 1 ..... 47, 48, 83

Art. VI, Cl. 2 ..... 15, 55

Amendment XIV 73, 83

BLEED THROUGH – POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No.

CENTRAL STATES COOPERATIVES, INC.,
a corporation,
Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY,
INC., a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

I.

STATEMENT OF MATTER INVOLVED.

(a) The Questions.

This application raises the following questions:

(1) Whether or not the amendment enacted by Congress in 1940, 54 Stat. 143 (1940) to Sec. 24(1) of the Judicial Code of the United States, 28 U.S.C.A., Sec. 41(1), is constitutional.

(2) Whether the amendment enacted by congress in 1940, 54 Stat. 143 (1940) to Sec. 24(1), of the Judicial

Code of the United States, 28 U.S.C.A., Sec. 41(1), in pursuance of Art. I, Sec. 8 of the constitution of the United States,

> (Cl. 17) "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, • • •
>
> (Cl. 18) "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof, • • •"

granting to the district courts original jurisdiction of all suits of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 and is between "citizens of the District of Columbia, the territory of Hawaii or Alaska and any state or territory," is *a law of the United States* within the meaning of that portion of Art. III, Sec. 2 of the constitution of the United States, which reads,

> "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States • • •"

(3) Whether, since Art. I, Sec. 8, Cl. 9, grants to congress power "to constitute tribunals inferior to the Supreme Court" and Cl. 17 grants to congress power "to exercise exclusive legislation in all cases whatsoever over such district • • • as may • • • become the seat of government of the United States", the full powers of a sovereign government, subject only to express constitutional limitations, are vested in the federal government over the citizens of the United States resident of or domiciled in the District of Columbia, and whether by reason thereof congress may vest in inferior courts of the United States, located outside the District of Col-

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umbia, jurisdiction of cases by or against citizens of the United States resident of or domiciled in the District of Columbia.

(4) Whether that portion of Art. III, Sec. 2 of the constitution of the United States, reading:

> "controversies • • • between citizens of different states"

is in any sense a limitation upon that portion of Art. III, Sec 2, reading:

> "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States • • •"

(5) Whether (aside from the above questions) a citizen of the United States resident in the District of Columbia is properly to be considered as one of the "citizens of different states" within the meaning and purpose of Art. III, Sec. 2 of the constitution of the United States as a basis for diversity jurisdiction of the Federal Courts.

(b) The Proceedings.

An action was commenced by the plaintiff, Central States Cooperatives, Inc., a corporation of the District of Columbia, in the Municipal Court of Chicago on October 2, 1946 (R. 3, 4) against the defendant, Watson Bros. Transportation Co., Inc., a Nebraska corporation, to recover possession of certain premises in Chicago (R. 4) improved as a truck freight terminal and worth at least $100,000.00 (R. 7, 9, 23). The defendant filed its petition (R. 7) and bond (R. 23) in that court on October 15, 1946, for removal of the cause to the United States District Court for the Northern District of Illinois, Eastern Division, on the ground of diversity of citizenship (R. 7).

After the transcript of the record on removal was filed in the District Court the plaintiff filed its amended complaint (R. 40) for possession, showing that the plaintiff held over in the premises after the expiration, on September 30, 1946, of a written lease on the premises. The defendant answered on December 17, 1946 (R. 61) admitting the expiration of the written lease but claiming an oral lease from the plaintiff for the period from October 1, 1946 to June 30, 1947. Upon a hearing of the cause on December 23, 1946 (R. 82) before a jury, the court at the close of defendant's evidence sustained the plaintiff's motion for a directed verdict for the plaintiff (R. 141-145), finding the defendant guilty of unlawfully withholding from the plaintiff possession of the premises, and judgment was entered accordingly.

The defendant filed its notice of appeal on December 24th (R. 145) and supersedeas bond (R. 150) on appeal to the United States Circuit Court of Appeals for the Seventh Circuit. The record was filed in the Circuit Court of Appeals on February 1, 1947 (R. iii), and the parties filed their several briefs to the merits, the last of which was filed July 11, 1947.

While the appeal was pending and undisposed of on the merits, the defendant on September 23, 1947 filed in the Circuit Court of Appeals (R. 181, 184-193) its motion to reverse the judgment of the District Court and to remand the cause to the District Court with instructions to remand the cause to the state court, for want of jurisdiction of the District Court. Briefs were filed by the parties in support of and in opposition to the motion (R. 194). On October 30th the motion to reverse was denied without prejudice to the defendant's right to renew the motion at the time of the hearing on the merits on November 10, 1947 (R. 194). The opinion of the Circuit Court of Appeals was filed December 12, 1947

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(R. 195) with a dissenting opinion by Judge Evans (R. 203), reversing and remanding the cause, with directions that the District Court remand the cause to the State court from which it was removed (R. 203, 216). The plaintiff's petition for rehearing was filed December 27, 1947 (R. 216) and was denied January 20, 1948 (R. 218).

II.

BASIS FOR THE JURISDICTION OF THIS COURT.

A. The statutory provision which sustains the jurisdiction of the court to review the judgment of the Circuit Court of Appeals in this case is Section 240 of the United States Judicial Code (43 Stat. 938 (1925)), also known as U.S.C.A. Title 28, Sec. 347.

B. The statute of the United States, the validity of which is involved is Section 24 (1) of the Judicial Code as amended by Congress in 1940 (54 Stat. 143 (1940), 28 U.S.C.A. Sec. 41 (1)), which provides:

> "The district courts shall have original jurisdiction as follows: First, of all suits of a civil nature, * * * where the matter in controversy * * * (b) is between citizens of different states or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory * * *"

C. The date of the judgment sought to be reviewed is January 20, 1948 (R. 218). Petition for certiorari herein is filed for presentation on April 16, 1948.

D. The nature of the case is fully stated in the foregoing statement of matter involved. The ruling of the Circuit Court of Appeals that the United States statute giving jurisdiction to the district court is unconstitutional raises a question entirely of a Federal nature and one

that is substantial, affecting the rights of United States citizens throughout the nation and of the scope of jurisdiction of all Federal District courts. It is believed that the jurisdiction of this court is sustained in this case by the following cases:

Gay v. *Ruff*, 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099;

Del Vecchio v. *Bowers*, 296 U. S. 280, 56 Sup. Ct. 190, 80 L. Ed. 229;

Brooklyn Sav. Bank v. *O'Neil*, 324 U. S. 697, 65 Sup. Ct. 895, 89 L. Ed. 1296;

Hickman v. *Taylor*, 329 U. S. 495, 67 S. Ct. 385, 90 L. Ed. —;

Lilly v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411;

Pullman Co. v. *Jenkins*, 305 U. S. 534, 83 L. Ed. 334, 59 S. Ct. 347.

E. Copies of the opinions in Circuit Court of Appeals appear in the Transcript of Record (R. 195, 203), and have been reported as 165 F. 2d 392.

III.

REASONS FOR GRANTING THE WRIT.

Your petitioner further respectfully represents that:

(a) The Circuit Court of Appeals has, in this case, decided an important question of federal law which has not been, but should be settled by this court.

(b) The Circuit Court of Appeals has, in this case decided an important question of federal law in a way probably in conflict with applicable decisions of this court.

The effect of the Circuit Court of Appeals' ruling is (a) that an act of congress exercising its exclusive legislative powers, under Art. I, Sec. 8, Cl. 17 of the constitution, by vesting jurisdiction in the Federal district courts to hear cases involving citizens of the District of Columbia, is not a law of the United States within the meaning of Art. III, Sec. 2 of the constitution conferring judicial powers on the federal government; (b) that the judicial power does not extend to cases arising under such an act of Congress as a law of the United States within the meaning of Art. III, Sec. 2; (c) that Congress may not vest in inferior courts of the United States located outside of the District of Columbia jurisdiction of cases by or against citizens of the United States resident in the District of Columbia, although Art. I, Sec. 8, Cl. 9 grants to Congress power "to constitute tribunals inferior to the Supreme Court," Cl. 17 grants to Congress power "to exercise exclusive legislation in all cases whatsoever over such district • • • as may • • • become the seat of government of the United States", and Cl. 18 grants to Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or any department or officer thereof."

(c) The Circuit Court of Appeals has ruled that an act of Congress, vesting the jurisdiction in federal district courts to hear cases involving citizens of the District of Columbia, is unconstitutional.

This question is of sufficient importance to lead Justice Evans of the Circuit Court of Appeals to say in his dissenting opinion (R. 215):

"In conclusion, I would hold the Act in question to be constitutional even if the doubts which I entertained were more substantial than they are. I would not declare an act unconstitutional in so important a statute, where there was serious doubt, but would leave to the Supreme Court that decision."

(d) While this is the first Circuit Court of Appeals decision on the question here involved, the district courts in the several circuits have decided the matter differently, three district courts having held the act constitutional:

Winkler v. *Daniels*, 43 F. Supp. 265 (D. C. Vir. 1942);

Glaeser v. *Acacia Mutual Life Association*, 55 F. Supp. 925 (D.C. N.D. Cal. 1944);

Duse v. *Woolley*, 72 F. Supp. 422 (D.C. Hawaii 1947);

seven having held the act unconstitutional:

Wilson v. *Guggenheim*, 70 F. Supp. 417 (D.C. E.D. So. Car. 1947);

McGarry v. *City of Bethlehem*, 45 F. Supp. 385 (D.C. E.D. Pa. 1942);

Federal Deposit Ins. Corp. v. *George-Howard*, 55 F. Supp. 921 (D. C. W.D. Mo. 1942); reversed 153 F. 2d 591 (CCA 8th, 1946);

Behlert v. *James Foundation of New York*, 60 F. Supp. 706, (D.C. S.D. N.Y. 1945);

Ostrow v. *Samuel Brillant Co.*, 66 F. Supp. 593 (D.C. D. Mass. 1946);

Feeley v. *Sidney S. Schupper Inter-State Hauling System*, 72 F. Supp. 663 (D.C. D. Md. 1947);

Willis v. *Dennis*, 72 F. Sup. 853 (D.C. W.D. Va. 1947).

Later the Circuit Court of Appeals for the Fourth Circuit, in the case of *National Mutual Insurance Co., of*

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District of Columbia v. *Tidewater Transfer Co., Inc., of Virginia,* 165 F. 2d 531, has held the act in question unconstitutional, Justice Parker writing a dissenting opinion, page 536.

The question has attracted much attention from the bar and legal scholars as evidenced by the several law review articles on the subject:

The Constitutionality of the 1940 Extension of Diversity Jurisdiction, 55 Yale Law Journal 600;

Federal Procedure—Diversity of Citizenship as Applied to Citizens of the District of Columbia and Territorities, 5 Louisiana Law Review 478;

Diversity of Citizenship Clause Extended, 29 Georgia Law Review 193;

Federal Jurisdiction—Constitutional Law, 11 George Washington Law Review 258;

Federal Procedure — Diversity Jurisdiction — 1940 Amendment, 21 Texas Law Review 83;

The 1940 Amendment to the Diversity of Citizenship Clause, 21 Tulane Law Review 171;

Federal Jurisdiction—Constitutional Law—District of Columbia, XLVI Columbia Law Review 125;

Diversity of Citizenship Clause Extended, 29 Georgetown Law Journal 193;

Washingtonians and Rumanians, Nebraska Law Review, March, 1948.

(e) The decision in the case in bar in the Seventh Circuit, and in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.,* 165 F. 2d 531, in the Fourth Circuit, are contrary to the meaning and effect of the case of *Arroyo* v. *Puerto Rico Transportation Authority,* 164 F. 2d 748 (C.C.A. 1st), and *Federal Dep. Ins. Corp.* v. *George-Howard,* 153 F. 2d 591 (C.C.A. 8th).

It is submitted that the questions are, therefore, of such importance and gravity that they should be resolved by this court at the earliest opportunity.

IV.

PRAYER.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the within case, numbered on the docket of said Court as No. 9291, to the end that said judgment of said Circuit Court of Appeals may be reviewed by this Court, as provided by law, and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioners may have such other relief as to this Court may seem appropriate.

Central States Cooperatives, Inc.,
a corporation, Petitioner

By THOMAS G. MCBRIDE,
GEORGE E. BULLETT,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No.

CENTRAL STATES COOPERATIVES, INC.,
a corporation,

Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY,
INC., a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinions of the United States Circuit Court of Appeals in the case at bar have been reported, 165 F. 2d 392. Copies appear in the transcript of record (R. 195, 203).

II.

The Jurisdiction of This Court.

A. The jurisdiction of this Court is invoked under Section 240 of the United States Judicial Code (43 Stat. 938 (1925); 28 U.S.C.A. 347), to review a judgment of

the Circuit Court of Appeals, which became final on January 20, 1948, by the foregoing petition for certiorari filed in this Court on April 16, 1948.

B. The matters involved in this case are wholly of a federal nature, as shown by the accompanying statement of the case, involving the questions (a) of the constitutionality of an act of Congress affecting the jurisdiction of the Federal district courts and (b) whether an act of Congress relating to the District of Columbia, giving jurisdiction to the federal district courts in suits involving citizens of the District, is a law of the United States to which the judicial power of the United States extends under Art. III, Sec. 2 of the Constitution.

III.

Statement of Case.

The central question presented by this petition for certiorari is whether the act of Congress granting to the district courts of the United States jurisdiction to hear cases brought by or against citizens of the District of Columbia is constitutional.

The case arose in the Municipal Court of Chicago and was removed by the defendant to the United States District Court for the Northern District of Illinois, Eastern Division, whereby the defendant invoked the jurisdiction of the United States District Court under Section 24 (1) of the Judicial Code of the United States as amended by congress in 1940. After a decision by that court adverse to the defendant and while the cause was pending on defendant's appeal on the merits before the Circuit Court of Appeals for the Seventh Circuit, the defendant moved to reverse the judgment of the trial court, to remand the case with directions to the District Court to remand the case to

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the state court from which the cause was removed, contending in the Circuit Court of Appeals that the act of Congress, which the defendant had previously invoked to sustain the jurisdiction of the district court, was unconstitutional. The plaintiff sought to sustain the constitutionality of the act of Congress before the Circuit Court of Appeals on the ground that the amendment of 1940 to Section 24(1) of the Judicial Code was a "law of the United States" within the meaning of Art. III, Sec. 2, enacted by Congress in pursuance of Art. I, Sec. 8, Cl. 17 and 18 of the Constitution of the United States. The Circuit Court of Appeals for the Seventh Circuit held such Act unconstitutional and reversed and remanded the case to the District Court, with directions to the District Court to remand the cause to the state court. This petition for certiorari is filed to seek a review of the judgment of the Circuit Court of Appeals, to reverse the judgment of the Circuit Court of Appeals, to sustain the constitutionality of the act of Congress in question and the jurisdiction of the United States District Court in the case at bar.

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding as a matter of law that Sec. 24(1) of the Judicial Code as amended by Congress in 1940, 54 Stat. 143 (1940), 28 U.S.C.A. Sec. 4(1) is unconstitutional.

(2) The Circuit Court of Appeals erred in reversing and remanding the cause with directions that the District Court remand the cause to the state court from which it was removed.

(3) The court erred in sustaining the motion of the defendant filed September 23, 1947 to reverse and remand

the cause with directions to the District Court to remand the cause to the state court from which it was removed.

(4) The court erred in not overruling the motion of the defendant filed September 23, 1947 to remand and reverse the judgment of the District court with directions to the District Court to remand the cause to the state court from which it was removed.

(5) The court erred in not considering the cause and rendering judgment in the cause on the merits in the appeal of the defendant from the judgment of the District court in favor of the plaintiff.

V.

Summary of the Argument.

1.

A. Art. III, Sec. 2 of the constitution of the United States, in providing that the judicial power of the United States shall extend to cases arising under the "constitution, the laws of the United States * * *," encompasses necessarily and by long established precedent all those laws enacted by congress under the constitutional grants of legislative power contained in Art. 1, Sec. 8, Cl. 1 to 18.

B. Thus, although Art. III, Sec. 2 does not specifically enumerate what are or shall be "laws of the United States," it has long been recognized that Congress may invest courts of the United States with jurisdiction of cases involving "federal questions," patent, copyright, interstate commerce or bankruptcy cases, for example, since acts of Congress on these subjects are "laws of the United States" within the grant of legislative power under Art. 1, Sec. 8.

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C. Thus, also, the 1940 amendment to Sec. 24(1) of the judicial code is a law of the United States within the meaning of Art. III, Sec. 2, because congress has power under Art. 1, Sec. 8, Cl. 17 to enact such legislation, so that the judicial power of the United States extends by virtue of Art. III, Sec. 2 to cases arising under such law.

2.

Art. I, Sec. 8, Cl. 17 vests in Congress power "to exercise exclusive legislation in all cases whatsoever over such district * * * as may * * * become the seat of the government of the United States * * *."

A. Congress in enacting legislation affecting the District of Columbia or its citizens,

(a) Acts not as a local legislature, but in its one high character as a national legislature;

(b) Creates, not local laws, but laws of the United States, which under Art. VI, Cl. 2 are the supreme law of the land;

(c) Creates laws binding the nation, like acts made in pursuance of other powers, and possessing obligation out of the ten miles square of the District of Columbia;

(d) Exercises power, including not only the powers that belong to Congress in respect to territory within a State, but also the powers of the State as well, a delegation which embraces full and unlimited jurisdiction, subject only to the prohibitions of the Constitution, to provide for the general welfare of citizens of the United States resident within the District of Columbia by any and every act of legislation which Congress may deem conducive to that end.

3.

Congress in exercising unlimited sovereign and exclusive powers under Art. I, Sec. 8, Cl. 17, in relation to the citizens of the United States resident in the District of Columbia, in order to provide them those privileges and immunities and to impose upon them those obligations essential to an ordered society of free people, has the function among other things to establish courts of justice with jurisdiction to entertain actions in law or in equity by or against citizens of the United States, residents of the District of Columbia.

A. In exercising this power of providing for the enforcement of private or civil rights of citizens of the United States resident in the District of Columbia by judicial proceeding in courts of the United States, Congress is acting not as a local but as a constitutional national legislature.

B. Congress is not limited in exercising such national sovereign powers, in relation to the citizens of the United States resident in the District of Columbia to vesting solely the courts of the District of Columbia with jurisdiction of causes brought by or against such citizens, but may vest all the courts of the United States with such jurisdiction.

C. Congress, as the only sovereign power over citizens of the District of Columbia under Art. I, Sec. 8, Cl. 17, in passing laws respecting their rights and obligations, has discretion, under Art. 1, Sec. 8, Cl. 18, in protecting such rights and enforcing such obligations, to vest courts of the United States with such jurisdiction of civil cases brought by or against citizens of the District of Columbia, as Congress deems most eligible and best adapted to attain the object.

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4.

A. The grant of judicial power in Art. III, Sec. 2 in cases arising under "the constitution, the laws of the United States" is independent of and is not limited by the later grant in cases involving "controversies • • • between citizens of different states."

B. The constitutionality of the statute in question rests upon the grant of judicial power extending to cases arising under "the laws of the United States", and this is sufficient.

5.

Aside from the above basis for the constitutionality of the amendment of 1940 Sec. 24(1) of the Judicial Code, a citizen of the United States resident in the District of Columbia, may properly be considered as one of the "citizens of different states" within the meaning and purpose of Art. III, Sec. 2 of the constitution of the United States, in the use of the words "between citizens of different states."

ARGUMENT.

1. A.

Art. III, Sec. 2 of the constitution of the United States, in providing that the judicial power of the United States shall extend to cases arising under the "constitution, the laws of the United States * * *," encompasses necessarily and by long established precedent all those laws enacted by congress under the constitutional grants of legislative power contained in Art. I, Sec. 8, Cl. 1 to 18.

This case presents the question of the constitutionality of the amendment of 1940 to Sec. 24 (1) of the judicial code, wherein the original jurisdiction of federal district courts in civil suits was extended to include suits between "citizens of different states, or citizens of the District of Columbia, the territory of Hawaii, or Alaska and any state or territory.

Section 24 (1) of the Judicial Code, as amended by Congress in 1940, 54 Stat. 143 (1940), 28 U.S.C.A., Sec. 41 (1), reads in part:

> "The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and * * * (b) is between citizens of different states or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory * * *"

Prior to the amendment of 1940, the statute did not contain the words "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any state

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or Territory," and it had been held that the federal courts, in the absence of a federal question, were closed to citizens of the District of Columbia and territories. (*Hepburn* v. *Ellzey*, 6 U. S. (2 Cranch) 445, 452, 2 L. Ed. 332; *Barney* v. *City of Baltimore*, 73 U. S. (6 Wall.) 280, 18 L. Ed. 825; *Hooe* v. *Jamieson*, 166 U. S. 395, 17 S. Ct. 596, 41 L. Ed. 1049).

The same rule has been applied to one who leaves his domicile and establishes no other, *Pannill* v. *Roanoke Times Co.*, 252 Fed. 910 (1918); and to a naturalized citizen who abandons his domicile and returns to his native country, *Stein* v. *Fleischmann Co.*, 237 Fed. 679 (1916); and to a United States citizen domiciled in Canada, *Prentiss* v. *Brennan*, 2 Blanchf. 162, 19 Fed. Cas. 1278 No. 11,385 (C.C. N.Y. 1851); and to a citizen of an Indian territory, *Snead* v. *Sellers*, 13 C.C.A. 518, 66 Fed. 371 (C.C.A. 5th 1894); *Clark* v. *City of Peoria*, 13 Fed. 561 (C.C. Ill. 1882). See also *Paul* v. *Chilsoquie*, 70 Fed. 401 (C.C. Ind. 1895), affecting an unnaturalized Indian; and *Banker's Trust Co.* v. *Texas & Pacific Ry.*, 241 U. S. 295, 36 S. Ct. 569, 60 L. Ed. 1010 (1916), where the corporation was held to be a "citizen of the United States" but not a citizen of any state.

In the leading case, *Hepburn* v. *Ellzey*, above cited, the plaintiffs, citizens of the District of Columbia, brought an action in the then Circuit Court of the United States for the District of Virginia. The defendant, a citizen of Virginia, challenged the jurisdiction of the court on the ground that the requisite diversity of citizenship was lacking. There the Supreme Court was passing upon an *Act* of Congress which gave "jurisdiction to the circuit courts in cases between a citizen of the *state* in which the suit is brought, and a citizen of another *state*." (Act of September 24, 1789, 1 Stat. 73, Sec. 11) Chief Justice Marshall said:

> "The question * * * is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the *Act of Congress* describing the jurisdiction to the Circuit Courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state. * * * as the act of Congress obviously uses the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution."

We would like to observe at this point that the question being examined here was not whether Congress had power to vest United States courts with such jurisdiction, but rather whether Congress had done so by the Act of September 24, 1789. Chief Justice Marshall, later in the same opinion wrote:

> "It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon *them*. But this is a subject for legislative, not for judicial consideration."

It is to be noted that the Chief Justice did not hold that Congress was without power to vest jurisdiction in such cases in the courts of the United States, but did observe that it was up to Congress to grant or deny such jurisdiction to the courts of the United States. In its 1940 amendment to the diversity statute, the Congress accepted the invitation extended in 1805 by Chief Justice Marshall and made the subject one of legislative con-

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sideration. We have the "*legislative* consideration" in the form of a new Act here under consideration. In the *Ellzey* case, the Congressional Act held not to grant the District of Columbia citizens recourse to the Federal court, was couched in the same limited phraseology as the Constitution, *i.e.*, "citizens of different *states.*" Now Congress has become specific and included citizens of territorities *and the District of Columbia.* No longer need we lament the unfairness of an Act which makes our courts open to "aliens" and "closed" to citizens of the District of Columbia. One would have thought that this would present the problem in such a different light that there would have been no question of the constitutionality of the amendment.

The amendment was adopted to afford to citizens of the United States resident in the District of Columbia and territorities the valuable privilege of access to the federal courts enjoyed by citizens of the states in diversity cases, consistent with a basic principle of American government, that equality of privilege and freedom from discrimination is an inalienable right of all citizens of the United States. Congress by this amendment was for the first time providing a tribunal to a considerable segment of its citizens wherein they could protect and vindicate their rights and enjoy this foremost of American privileges of being treated on terms of equality in the protection and defense of their fundamental rights as citizens to life, liberty and property.

The manifest purpose of the constitutional provision conferring jurisdiction on the federal courts in cases involving citizens of different states was to secure the citizen against local prejudice which might injure him if he were compelled to litigate controversies in the tribunals of his adversary's state. The question involved

is not a theoretical one, but one of great practical significance. To deny to a citizen of the District the right to resort to the federal courts, means that he must seek justice in a court of the state of his adversary, where he will find, in many of the states, that trial by jury has been stripped of many of its safeguards and the judge has been denied the common law powers necessary to the proper administration of justice. (See article by Judge Merrill E. Otis, Journal of American Judicature Society, vol. 21, p. 105 *et seq.*). To require a non resident to try his case in such a tribunal is not only to turn him over to the tender mercies of a local jury, without power in the presiding judge to counteract the appeals to prejudice of local counsel, it is also to deny to him the sort of trial by jury which as a citizen of the United States he is entitled to have in the federal courts. (*Herron* v. *Southern Pac. Ry. Co.*, 283 U. S. 91, 95, 51 S. Ct. 383, 75 L. Ed. 857; *Patton* v. *United States*, 281 U. S. 276, 288, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13-16, 19 S. Ct. 580, 43 L. Ed. 873; *United States* v. *Philadelphia & R. R. Co.*, 123 U. S. 113, 114, 8 S. Ct. 77, 31 L. Ed. 138; *United States* v. *Fourteen Packages of Pins*, 1 Gilp. 235, 25 Fed. Cas. 1182, 1189, No. 15,151).

The question is whether the framers of the constitution failed by oversight to vest in the federal government power to apply this principle of equality in the case of that unique group of United States citizens resident in the District of Columbia and the territorities who are not citizens of any state. As Justice Evans wrote in his dissenting opinion in the court below (R. 203):

> "• • • That result, however, leaves such a sour taste, it is so contrary to the practice of the forefathers to deal differently with one group of citizens than with another, that I not only pause but must reject forthwith any construction which would at-

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tribute to the founders an intent to treat a large part of our population—now nearly a million—so as to deny them what is given to all other citizens in other states.

"I can not attribute any such intent to them.

"The construction of the majority must be accepted, if at all, solely on the ground of oversight by the framers of Article III. As to that view, the outstanding thought is that no construction of the Constitution should be adopted which attributes to silence or failure to specifically mention a group, controlling weight, over a clear intention to treat all alike.

"The entire scheme of the Federal Government as the finished Constitution bespeaks, is equality of the citizens. The two dominating thoughts that run throughout its length and breadth, and through all the debates leading to its final adoption, are (a) the supremacy of the citizen, and (b) the equality of the citizens.

"The majority opinion denies to the citizen of the District of Columbia a right which the citizen of every state in the Union enjoys. He may not sue in a Federal Court on the basis of diversity of citizenship to protect his rights, if he be a citizen of the District of Columbia. Of all the territories in which to deny a citizen that right, the District of Columbia seems to me to be the most illogical and unjustifiable.* * *"

We submit the framers cannot be charged with such oversight, and that the Chief Justice Marshall was on sound ground in observing in effect that the Congress might provide the federal courts with such jurisdiction. The purpose of this argument is, by an analysis of the pertinent constitutional provisions as interpreted by judicial precedent, to show that Congress has been granted such power.

At the outset it is necessary, we believe, to recognize, first, that Sec. 24 (1) of the judicial code in granting

diversity jurisdiction, as it existed prior to 1940, *rested solely* upon that portion of Art. III, Sec. 2 reading "controversies • • • between citizens of different states," and second, that the 1940 amendment *did not rest upon this diversity clause* of Art. III, Sec. 2, in vesting jurisdiction in the district courts of suits between citizens of the District of Columbia and citizens of any state, but *upon that portion* of Art. III, Sec. 2 reading, "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States. • • •"

The cases referred to in the Petition for Certiorari herein, holding against the constitutionality of the Act in question, as well as the decision sought to be reviewed, have weighted the problem only by considering whether the amendment could be supported by the diversity clause of Art. III, Sec. 2, and by discarding consideration of Art. I, Sec. 8, Cl. 17 with the inadequate observation that Congress is limited in the vesting of judicial power in federal district courts outside the District of Columbia to those cases enumerated in Art. III, Sec. 2. We do *not contend* here that Congress has authority beyond the limits of Art. III, Sec. 2 to vest judicial power in federal district courts outside the District of Columbia; but we *do contend* that congress has authority under Art. III, Sec. 2 to extend the judicial power of such courts to all cases *arising* under the *constitution* and *laws of the United States. This is the crucial point the cases have missed.*

And when the meaning of the phrase of Art. III, Sec. 2, "cases • • • arising under this constitution, the laws of the United States," is considered it is realized at once that recourse must be had to the enumerated powers of Congress contained in Art. I, Sec. 8 to determine

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what are "laws of the United States" to which the judicial power of the United States extends under Art. III, Sec. 2. This should not have been a difficult legal or mental process, nor does this present anything new or foreign to constitutional law and precedents.

When Art. III, Sec. 2 authorizes Congress to invest in the courts of the United States jurisdiction in "all cases in law and equity, arising under this constitution, the laws of the United States," it lays the basis for the long and widely exercised power of congress to grant to the federal courts jurisdiction of cases involving "federal questions." Laws of congress enacted under Art. I, Sec. 8, create and are the basis for determining in part what are the "federal questions" to which the judicial powers of the federal courts extend under and by virtue of Art. III, Sec. 2. Thus, laws of Congress relating to interstate commerce, patents and bankruptcy based on Art. I, Sec. 8, create "federal questions" and cases arising thereunder lie within the jurisdiction of federal courts. Thus, also, laws of Congress under Art. I, Sec. 8, Cl. 17, create federal questions, so that when Congress by the 1940 amendment extended to federal courts jurisdiction of suits between citizens of the District of Columbia and the states, *it made the residence or domicile in the District of Columbia of citizens of the United States a federal question.* This is not unusual since residence and domicile are often made jurisdictional matters, (*United States* v. *Union Pacific Rd. Co.*, 98 U. S. 569, 602, 25 L. Ed. 143) and are often the determining factors in problems of taxation, inheritance and other rights, privileges and immunities of citizens. (*District of Columbia* v. *Murphy*, 314 U. S. 441, 62 S. Ct. 303, 86 L. Ed. 329).

The competency of Congress to determine the existence of a federal question has been upheld. In *Federal*

Deposit Insurance Corp. v. *George-Howard,* 153 F. 2d 591 (C.C.A. 8th 1946), it was held that all suits to which the Corporation is a party are to be deemed to arise under the laws of the United States. The court observed in *Federal Reserve Bank of Richmond* v. *Kalin,* 77 F. (2d) 50 (C.C.A. 4th 1935) that "all suits to which any Federal Reserve Bank shall be a party shall be deemed to arise under the laws of the United States." (Compare also U. S. Rev. Stat. (1873) Ses. 563, par. 18; Act of July 1, 1898, c. 541, Sec. 2, 23, 30 Stat. at L. 545, 552; Act of March 3, 1911, c. 23, Sec. 24, par. 19, 36 Stat. at L. 1093, 28 U.S.C.A. Sec. 41 (19) whereby district courts are given original jurisdiction of "all matters and proceedings in bankruptcy"). The Constitution, for instance, gives the Congress the specific power to make uniform laws with respect to bankruptcy. It has been held that no actual construction of a law of the United States need be involved in bankruptcy cases. For an excellent and comprehensive article we refer to Forrester, The Nature of A "Federal Question," 16 Tulane L. Rev. 362 (1942).

To the same effect is *Arroyo* v. *Puerto Rico Transportation Authority,* 164 F. 2d 748.

In the report of the House Committee on the amendment of 1940 (H.R. No. 1756, March 12, 1940, Committee on the Judiciary, 76th Congress, 3rd session) it appears that Congress rested its grant of jurisdiction of cases involving District of Columbia citizens not upon the diversity of citizenship clause of Art. III, Sec. 2, but upon the general grant of judicial power contained in Art. III, and upon its power to determine a federal question under Art. I, Sec. 8, Cl. 17, within the meaning of Art. III, Sec. 2. This reads in part as follows:

> "The federal district and circuit courts are created by Congress under the constitutional authority

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granted in Article III. These courts receive and exercise the judicial power granted by the Constitution. This judicial power cannot be increased or limited simply by an act of Congress.

"This article, however, must be construed in connection with other provisions of the Constitution. For example, in Article I, section 8, it is provided:

> 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.'

"*That the Congress under this provision has complete authority to govern the District of Columbia and the affairs of its citizens is well settled.* This right is, of course, subject to constitutional restraints so far as applicable.

"The purpose of Article III was to create an independent judiciary with powers conferred directly by the Constitution. These powers cannot be taken away from Congress. The Constitution guarantees to certain persons the right to demand the exercise of these powers under certain circumstances. For example, a citizen of a State may do so when involved in a case or controversy with a citizen of another State. The mere fact that the Constitution guarantees this right to the citizens of a State in no way prohibits the Congress from extending that same privilege to others who are not technically citizens of a State. This does not mean that Congress may indiscriminately add to the jurisdiction or authority of the courts. Its powers to so add must in any case be found in the Constitution." (Italics supplied).

The principle in the minds of the framers of the Constitution in extending under Art. III to the federal judiciary power to entertain all cases arising under the

constitution and laws of the United States, was, in establishing a federal government, to provide that the judicial power be co-extensive with the legislative, and to provide that the laws of the United States be construed and applied in the courts of that federal government rather than in state courts to the advantage of the states and to the prejudice and confusion of the federal government. (3 Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution, 2d Ed. 1836, note 8 at p. 532, note 8 at p. 158, note 8 at p. 553; Forrester, The Nature of a "Federal Question", 16 Tulane Law Review, 362, 366). In the debate before the Virginia convention, John Marshall, later the great Chief Justice, said:

> "With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he says that, the laws of the United States are paramount to the laws of the particular states, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? * * * Can they go beyond the delegated powers?" 3 Elliott, 2nd Ed. p. 553, note 8.

The "delegated powers" include, of course, the powers delegated to Congress under Art. 1, Sec. 8, which define the limits of the laws of the United States to which judicial power of the federal courts may be extended by Congress. Extensive consideration was given to this problem by Chief Justice Marshall in *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 5 L. Ed. 257, where he wrote, p. 381:

> "If it could be doubted, whether, from its nature, it [the federal government] were not supreme, in all cases where it is empowered to act, that doubt would be removed by the declaration, that 'this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties

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made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.' This is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority. * * *

(p. 382) "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves, limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintainence of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. * * *"

The same judge recognized the sound political principle on which this grant of judicial power, co-extensive with the legislative power, was founded when he said further in *Cohens* case (page 384):

"* * * While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in

the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered. * * *"

And further (page 415):

"* * * The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. 'Thirteen independent courts,' says a very celebrated statesman (and we have now more than twenty such courts) 'of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.'

(p. 416) "Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as

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well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved. * * *"

Having referred to the political basis and reasons for the vesting in the federal government judicial power in all cases arising under the constitution and laws of the United States, we now turn to the question as to what are to be considered cases *arising under* such constitution and laws. This question was the subject of extensive argument of counsel and careful consideration of the court in the above cited *Cohens* case where Chief Justice Marshall said (pages 378-80):

"* * * The counsel for the defendant in error have stated, that the cases which arise under the constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the 1st article. A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

"The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise

under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

"The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows, that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. • • •"

Within the first classification so made, that of claiming a right conferred by the constitution or law, said by Marshall to be too narrow, lies the case at bar where the plaintiff claims the right to maintain its action in the federal court. The plaintiff did not seek removal of the cause from the state court, but, when the defendant succeeded in bringing about the removal of the cause to the federal district court, the plaintiff proceeded with the cause, obtained judgment in its favor at the hands of the court and now defends the jurisdiction of the court to have received and entertained the cause.

Also within the second classification so made, that of a decision resting upon the construction of the constitution or law, lies the case at bar, *because* the construction of the meaning and effect of the constitution Art. III, Sec. 2, and Art. I, Sec. 8, Cl. 17 and 18 of the constitution are involved, *and because further* the operation and effect of Sec. 24(1) of the Judicial Code as amended in 1940 as a law of the United States are also involved. Upon the construction of both depends

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the right of the plaintiff to maintain its action in the federal district court.

In *Osborn* v. *United States Bank,* 22 U. S. (9 Wheat.) 737, 6 L. Ed. 204, the Bank of the United States brought an action in the federal circuit court in Ohio to restrain the state auditor from proceeding under the laws of Ohio to levy and collect a tax upon the business of the bank. The first question arose as to the jurisdiction of the court to entertain the suit. The act creating the bank gave the right to sue or be sued in courts of the United States. In considering the constitutionality of the act vesting the courts with such jurisdiction, Chief Justice Marshall wrote in the opinion:

> (p. 818): "We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the federal courts. In support of this clause, it is said, that the legislative, executive and judicial powers of every well-constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing (p. 819) every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find, that its framers kept this great political principle in view. The 2d article vests the whole executive power in the president; and the 3rd article declares, 'that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any

question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

"The suit of the *Bank of the United States* v. *Osborn and others,* is a case, and the question is, whether it arises under a law of the United States? The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of congress. If this were (p. 820) sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States. * * *

(p. 821) "* * * We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general (p. 822) principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. * * *

(p. 823) "* * * We think, then, that when a question to which the judicial power of the Union is extended by the constitution, *forms an ingredient of the original cause,* it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. * * *" (Emphasis ours).

The law of the United States involved in the *Osborn* case had only to do with the right of the corporation

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to sue in the federal court granted by the act of Congress; the constitutional question was the power of Congress to establish the bank and the power of the state to tax the bank. In the case at bar the law of the United States involved is that statute of Congress granting to citizens of the United States resident in the District of Columbia the right to sue in federal district courts, and the constitutional question is the power of Congress under Art. I, Sec. 8, Cl. 17 to act as the sovereign power over citizens of the District of Columbia and establish a judicial forum for such citizens. The judicial power of the federal court to entertain the suit of the Bank of the United States rested on that portion of Art. III, Sec. 2 extending the judicial power of federal courts to cases arising under the constitution and laws of the United States. If Congress had power to establish the bank it had power to vest the federal courts with jurisdiction of suits brought by the bank. Likewise if Congress has exclusive sovereign power over citizens of the United States resident in the District of Columbia it may vest federal courts with jurisdiction of suits brought by or against such District of Columbia citizens.

The case at bar lies also within the ruling in the case of *Starin* v. *New York,* 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388, where the court wrote (p. 257):

> "The character of a case is determined by the questions involved. *Osborn* v. *Bank of United States,* 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. *Cohens* v. *Virginia,* 6 Wheat. 264, 379; *Osborn* v. *Bank of United States,* 9 Wheat. 737,

824; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Kansas Pacific* v. *Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co.* v. *Ford*, 114 U. S. 635, 641; Pacific Railroad Removal Cases, 115 U. S. 1, 11."

In *Tennessee* v. *Davis*, 100 U. S. 257, 25 L. Ed. 648 (Tenn. 1880), we read:

> "A case arising under the Constitution and laws of the United States is not merely one where a party comes into court to demand something conferred upon him by the Constitution or a law or treaty. A case consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. *Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.*" (Emphasis ours).

In *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, (Mass. 1929), 279 U. S. 716, 49 S. Ct. 499; 73 L. Ed. 918, mandate conformed to 33 F. 2d 891, we read:

> "'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.'"

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We wish to quote from the case of *In re Lennon*, 166 U. S. 548, 553, 17 S. Ct. 658, 41 L. Ed. 1110, in which the opinion in part reads:

> "• • • It has been frequently held by this court that a case arises under the Constitution and laws of the United States, whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him, and the correct decision of the case depends upon the construction of such laws. • • •"

In *Gully* v. *First National Bank*, 299 U. S. 109, 57 Sup. Ct. 96, 81, L. Ed. 70, (1936), the court has restated the rule as to how and when a case arises under the Constitution or laws of the United States in Justice Cordozo's opinion, which reads in part (p. 112):

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U. S. 248, 257; *First National Bank* v. *Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County* v. *Seattle School District*, 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New Orleans* v. *Defiance*, 153 U. S. 184, 191; *Joy* v. *Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Joy* v. *St. Louis*, 201 U. S. 332; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; *Louisville & Nashville R. Co.* v. *Mottley*, 211

U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74. • • •"

The case at bar falls within these rules. The right here created by the laws of the United States pursuant to the constitution is that of suing in the federal courts; it will be supported if the constitution or laws of the United States in question are given one construction or effect and defeated if they receive another; a genuine and present controversy exists with reference thereto; and the plaintiff's citizenship of the District of Columbia is disclosed by the original complaint (R. 3).

1. B.

Thus, although Art. III, Sec. 2 does not specifically enumerate what are or shall be "laws of the United States," it has long been recognized that Congress may invest courts of the United States with jurisdiction of cases involving "federal questions," of patent, copyright, interstate commerce or bankruptcy cases, for example, since acts of Congress on these subjects are "laws of the United States" within the grant of legislative power under Art. I, Sec. 8.

It may be observed that Art. III, Sec. 2 does not anywhere make express reference to bankruptcy matters, patent or copyright cases, interstate commerce matters such as trade and labor regulations, as being within the judicial power of the United States. However, the Judicial Code, Sec. 24 (28 U.S.C.A. Sec. 41), provides:

"The district court shall have original jurisdiction as follows: • • •

(7) Of all suits at law or in equity, arising under the patent, copyright and the trade mark laws.

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(8) Of all suits and proceedings arising under any law regulation commerce. • • •

(19) Of all matters and proceedings in bankruptcy."

Sec. 48 of the Judicial Code (28 U.S.C.A. Sec. 109) provides:

"In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. • • •"

The jurisdiction granted in the above referred to Sections 24 and 48 of the Judicial Code can be sustained only under that portion of Article III, Sec. 2, which provides that the judicial power of the United States shall extend to cases arising under the constitution and laws of the United States, which is commonly known as the "federal question" clause of the constitution. Cases in law and equity, therefore, arising under such interstate commerce, bankruptcy, patent or copyright laws of the United States, enacted by congress under and by virtue of Art. 1, Sec. 8 of the constitution of the United States, are cases to which the judicial power of the United States extends under Art. III, Sec. 2, Cl. 1, when jurisdiction thereof is vested by congress in the courts of the United States. (Bankruptcy cases: *Schumacher* v. *Beeler*, 293 U. S. 367, 55 S. Ct. 230, 79 L. Ed. 433; *In re: Chicago R. I. & P. Ry. Co.*, 72 F. 2d 443 (C.C.A. 7th). Patent cases: *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, 35 S. Ct. 658, 59 L. Ed. 1056; *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 32 S. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913 D, 880; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 57 L. Ed. 716, 33 S. Ct. 410; *Cinema Patents*

Co. v. *Columbia Pictures Corp.*, 62 F. 2d 310, (C.C.A. 9th 1932). Commerce cases: *Weiss* v. *Los Angeles Broadcasting Co.*, 163 F. 2d 313; *Lucking* v. *Detroit & Cleveland Nav. Co.*, 284 F. 497, aff. 1924, 265 U. S. 346, 44 S. Ct. 504, 68 L. Ed. 1047; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 468, 14 S. Ct. 1125, 38 L. Ed. 1047).

Interesting in this connection, also, is the case of *Yakus* v. *United States*, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834, where the Supreme Court recognized that congress had power to vest an emergency court of appeals with jurisdiction to determine validity of price regulations under the Emergency Price Control Act and to vest in district courts of the United States jurisdiction to hear criminal cases involving violations thereof. Congress was empowered to vest such courts with jurisdiction in such cases because the Emergency Price Control Act was a law of the United States under the war powers of congress, granted in Art. I, Sec. 8, to which the judicial power of the United States extended under Art. III, Sec. 2, Cl. 1. The same observations may be made concerning other sub-paragraphs of Sec. 24 of the Judicial Code granting to the district courts original jurisdiction in various classes of cases involving "federal questions" not specifically referred to in Art. III, Sec. 2.

1. C.

Thus, also, the 1940 amendment to Sec. 24 (1) of the judicial code is a law of the United States within the meaning of Art. III, Sec. 2, because congress has power under Art. I, Sec. 8, Cl. 17 to enact such legislation, so that the judicial power of the United States extends by virtue of Art. III, Sec. 2 to cases arising under such law.

The question arose directly in *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 5 L. Ed. 256, whether an act

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of Congress regulating lotteries and relating to the District of Columbia was a mere local law or a law of the United States. The plaintiff in error, Cohens, had been convicted and fined by a Virginia court for the violation of a law of that state prohibiting lotteries in the state. The lottery had been conducted across the line between Virginia and the District of Columbia and Cohens claimed the benefit of the District of Columbia law permitting lotteries. He sued out a writ of error from the Supreme Court of the United States to the Virginia court to review the case. A motion was made to dismiss the writ of error on the ground that the Supreme Court was without appellate jurisdiction. It was urged that the Supreme Court had jurisdiction on the ground that the appellate judicial power of the court extended under Art. III, Sec. 2 to cases arising under the laws of the United States and that there was involved in the case the construction and application of a law of the United States. The motion to dismiss was denied and the court considered the case on the merits. In considering the motion the court held that an act of congress relating to the District of Columbia under Art. I, Sec. 8, Cl. 17 was not a local law but a law of the United States, and as such was the supreme law of the land, was binding on all of the United States, operated and possessed obligation out of the ten miles square of the District of Columbia and as a "law of the United States" was a basis for judicial power under Art. III, Sec. 2 and affected the jurisdiction of courts of the United States. Chief Justice Marshall in his opinion wrote:

> (p. 378) "The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties.

This class comprehends all 'cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This class extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

(p. 379) "The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. • • •

(p. 424) "• • • They deny that the act of congress, on which the plaintiff in error relies, is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article.

"*In the enumeration of the powers of congress, which is made in the eighth section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government.* This power, like all others which are specified, is conferred on congress *as the legislature of the Union;* for, strip them of that character, and they would not possess it. *In no other character can it be exercised.* In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, *it is in that character alone that the constitution confers on them this power of exclusive legislation.* This proposition need not be enforce. • • • If Congress were to be consid-

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ered merely as the local legislature for the fort or other place in which the offense might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, *that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union.* The American people thought it a necessary power, and they conferred it for their own benefit. *Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.*" (Emphasis ours).

The same principle was applied in the case of *Battle* v. *United States,* 209 U. S. 36, 28 S. Ct. 422, 52 L. Ed. 670, in deciding that an act of congress enacted by virtue of Art. I, Sec. 8, Cl. 17 is a law of the United States to which the judicial power of the United States extends. Here a crime was committed in a post office cite ceded to the United States under Art. I, Sec. 8, Cl. 17. The offender was tried and convicted in the *United States District Court of Georgia,* and assigned error that the court was without jurisdiction. Justice Holmes wrote in his opinion:

"This case comes up on a writ of error to the United States Circuit Court, after a conviction of the plaintiff in error of murder without capital punishment. The chief error assigned is that the court proceeded without jurisdiction—an objection taken by demurrer and renewed in other forms. The crime was committed upon land bought by the United States in the city of Macon, on which it was building a post office and courthouse, and over which the State of Georgia had ceded jurisdiction; but it is said that murder in a post office of the United States *has not*

been made an offense against the United States, whatever might be the power of Congress if it saw fit to put it forth.

"There can be no doubt of the power of Congress to purchase land within a State for post offices or courts, by consent of the legislature of the State, and to exercise exclusive legislation over the same. Post offices are among the 'other needful buildings' for the erection of which, as well as of 'forts, magazines, arsenals, dock-yards,' it is assumed that land will be bought, and for which land has been bought by the Government all over the United States. Const., Art. I, Sec. 8, Cl. 17. Indeed, this is not denied. The power to establish post offices is given by Art. I, Sec. 8, Cl. 7, in terms. See *Kohl* v. *United States*, 91 U. S. 367, 372; *Burt* v. *Merchants' Insurance Co.*, 106 Massachusetts, 356; *Trombley* v. *Humphrey*, 23 Michigan, 471, 475; *Sinks* v. *Reese*, 19 Ohio St. 306. The exclusive legislative power and jurisdiction of the United States is equally clear. *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *Benson* v. *United States*, 146 U. S. 325. *So that the question is only whether the statutes of the United States extend to this case, which was the question intended to be raised.*

"By Rev. Stat. Sec. 5339, 'Every person who commits murder—First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; * * * shall suffer death'; and by act of January 15, 1897, c. 29, Sec. 1, 29 Stat. 487, in such cases 'the jury may qualify their verdict by adding thereto "without capital punishment"' whereupon the sentence is imprisonment at hard labor for life. The jurisdiction of the United States courts under these sections is exclusive. Rev. Stat. Sec. 711. If the language of the Constitution is wide enough to authorize the purchase of land for a post office and court-house and the acceptance of a grant of jurisdiction, there is no reason for taking the language of the statute in any narrower sense. *The*

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argument, although ostensibly directed against the statute, must embrace the Constitution, and, as we have implied, such an argument comes many years too late." (Emphasis ours).

We consider this case a conclusive example that laws of congress under Art. I, Sec. 8, Cl. 17, are *laws of the United States* and *as such* affect the jurisdiction of inferior courts throughout the United States. Under Art. I, Sec. 8, Cl. 17, congress has power to exercise exclusive legislation in all cases whatsoever over not only the District of Columbia but over forts, arsenals and other needful buildings. In pursuance of this power, congress has enacted statutes providing for punishment of crimes committed in these areas. These are not local laws, these are laws of the United States. They are laws of the United States in two senses: first, they create offenses against not the local government but against the United States as a national government, which are prosecuted as such; second, they affect and impose burdens upon citizens of the United States resident in the area or anyone in the area, and such offenses are prosecuted in federal courts *outside such area* where no courts have been set up for the area. Therefore, congress has provided by statute that such crimes may be punished through criminal proceedings brought not in a local court in the fort or arsenal, but in the United States District courts in the district and state where the fort or arsenal is located. In other words, a statute of congress under Art. I, Sec. 8, Cl. 17, making certain acts committed in forts and arsenals of the United States crimes and punishable by criminal proceedings in *any* of the United States District courts, *thus affecting the jurisdiction of the Federal courts of the entire country.* This is not contrary to but consistent with Art. III, Sec. 2 because congressional statutes under Art. I,

Sec. 8, Cl. 17 are "laws of the United States" within the meaning of that phrase as found in Art. III, Sec. 2.

Since congress has power under Art. I, Sec. 8, Cl. 17 to vest the federal courts throughout the nation with jurisdiction to hear criminal cases brought against resident or occupants of federal areas, such as forts, arsenals, military reservations and the like for crimes committed therein, then Congress, we submit, has power to vest in such courts jurisdiction of civil suits by or against residents of such areas, including the District of Columbia, because in both cases such acts of congress are laws of the United States, within the meaning of Art. III, Sec. 2.

The effect of the legislation of congress, respecting the District of Columbia, outside that geographical area may be considered in the light of the effect of judgments of courts of the District of Columbia in the several states. U. S. Const. Art. 4, Sec. 1 states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

Congress extended its enactment under this provision to include the territories and the District of Columbia. In *Draper's Executors* v. *Gorman*, 35 Va. 628 (1837) the plaintiff sued in Virginia on a judgment secured in the District of Columbia. The court held the judgment was not entitled to full faith and credit, for although Congress had power to make state judgments binding within the District, it lacked power to give *extraterritorial* effect to judgments rendered *within* the District.

But the Supreme Court of the United States *held otherwise* in the case of *Embry* v. *Palmer*, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346. In this case Embry obtained a judgment for $9,185 against Palmer in the Supreme

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Court of the District of Columbia, and sued upon it in the courts of Connecticut. Palmer sued in the Connecticut courts in equity to enjoin enforcement of the judgment, setting up a defense to part of the claim said to be unknown to him but known to the plaintiff at the time. Decree was entered on condition that Palmer pay Embry $2296, that Embry be restrained from further prosecuting the judgment. Embry appealed to the Supreme Court of Errors of Connecticut and that court sustained the trial court, whereupon Embry appealed to the United States Supreme Court. Embry contended that the decree was in contravention of Art. IV, Sec. 1 of Constitution of United States and Sec. 905, C. 17, Tit. 13, Rev. Stat. U. S., providing that the records and judicial proceedings of the courts of the states and of the United States shall have full faith and credit given to them in the courts of the several states.

Considered alone, and without reference to the other sections of the Constitution, the full faith and credit clause applies to the states only, and not to the District of Columbia or the territories. Thus, when Congress desired to effectuate this clause, the first act it passed provided that full faith and credit be given to the records, judicial proceedings and acts of the legislatures of the states. (1 Stat. 122 (1790), 28 U.S.C. 687 (1934)). It did not include the District of Columbia or the territories. But a later Act (2 Stat. 298 (1804), 28 U.S.C. 688 1934)) extended this provision to the territories and the District of Columbia. These two statutory provisions subsequently became Sections 905 and 906 of the Revised Statutes. While they appear as companionate acts created by the same power, the constitutional bases for the two provisions are not the same. The full faith and credit clause (Art. IV, Sec. 1) enabled the first section of the act, applying to the states, to be passed. But the

provision relating to the territories and the District of Columbia rests, for its constitutionality, on other clauses of the Constitution, Art. I, Sec. 8, Cl. 17 and 18.

The Supreme Court reversed the decree on the ground that the judgment of the District of Columbia court was binding on the courts of Connecticut. The court said (p. 9):

> "So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on Art. 4, Sect. 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced. * * *"

To the same effect is *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55, 29 S. Ct. 397, 53 L. Ed. 695, involving a judgment of a court of the territory of New Mexico.

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It was held that Congress, under its power to legislate for the territorities, was able to confer jurisdiction on the federal courts in various states where one of the litigants was a citizen or inhabitant of a territory. Such a case is *Southern Kansas Railway* v. *Briscoe,* 144 U. S. 133, 12 S. Ct. 538, 36 L. Ed. 377. This case arose under the Act of July 24, 1884, which provided that the United States courts "shall have jurisdiction over all controversies between the Southern Kansas Railway Company and the inhabitants of the nations or tribes, throughout whose territory such railway shall be constructed, without reference to the amount in controversy and without distinction as to the citizenship of the parties, so far as may be necessary to carry out the provisions of this Act." Briscoe, an inhabitant of the Chickshaw Nation, Indian Territory, sued the Railway Company to recover damages for the alleged wrongful killing of certain of his livestock by one of the defendant's trains. Suit was instituted in the District Court of the United States for the Western District of Arkansas. In holding that it was competent for Congress to give the enumerated courts jurisdiction, the court said (p. 136):

> "It is true that apart from the jurisdiction over the subject matter, a citizen of a territory cannot sue a citizen of a State in the courts of the United States, nor an Indian Tribe or nation sue a state or its citizens, but *the judicial power extends to all cases in law and equity arising under the laws of the United States, and this case falls within that category, and we hold that it is.*"

Upon the authority of this case we would like to observe that, in extending the jurisdiction of the United States District Court to cases involving citizens of the District of Columbia in the act now in question, under Art. I, Sec. 8, Cl. 17, and in determining within what scope the District Courts of the United States would

have jurisdiction to entertain cases by or again District of Columbia citizens, congress did, although it was not obliged to, impose the jurisdictional amount of $3,000 and diversity of citizenship as a condition of jurisdiction. Accordingly, it would be quite proper for congress to provide that citizens or creatures of the District of Columbia, or any other territory acquired under Art. I, Sec. 8, Cl. 17, might sue or be sued in any United States district court without regard to the amount involved and diversity of citizenship, the same not being *constitutional limitations* upon the jurisdiction of the district courts with respect to suits arising under the laws of the United States, but being instead *legislative limitations* imposed by congress in the case of suits by or against citizens or creatures of the District of Columbia.

Applying these principles to the instant case, although the defendant claims to have brought the case to the United States District Court by removal from the Illinois court purely on the ground of diversity of citizenship, the plaintiff has a right to the advantage of the jurisdiction of the United States District Court, resting upon a law of the United States here involved, enacted in connection with citizens of the District of Columbia. The jurisdiction of the United States District Court must be sustained upon any basis of which it is susceptible.

We feel, in the light of the above authorities, that the language of Justice Parker in his dissenting opinion in the case of *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 165 F. 2d 531, at page 538, is worthy of careful consideration:

> "It is suggested that the power to create courts for citizens of the District is limited geographically

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to the District; but there is nothing in the Constitution from which any such limitations can be spelled out. It should be noted that the power of Congress is not merely to exercise exclusive legislation over the District, but also to make all laws necessary and proper to that end, which certainly would seem to authorize legislation necessary to secure a proper administration of justice for its citizens. See Art. 1, Sec. 8 (17) and (18). The power to legislate for the citizens of the District, as we have seen, is full legislative power, combining that possessed by Congress and a state legislature and, except for express limitations contained in the Constitution itself, analagous to the full power possessed by the Parliament of England. Certainly, if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts (*In re Ross*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581) or the United States Court for China (*Ex Parte Bakelite Corp.*, 279 U. S. 438, 451, 49 S. Ct. 411, 73 L. Ed. 789), there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District, for the power to legislate for their protection in this regard is just as clearly given as the power to legislate for citizens of the country resident or trading abroad. That the protection is exercised in this rather than in a foreign country would seem to support rather than to negative the right to exercise it."

Another approach to the problem lies in considering a rule of construction, applicable alike to private contract, statute or constitution, requiring that if there be any problem of construction of two parallel provisions, one general and one specific, the specific shall control. The specific constitutional provision here involved gives Congress all inclusive power of legislation over the District of Columbia and its citizens. In *Lockerty* v. *Phillips*, 319

U. S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339, the court observes (p. 187):

> "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to" ordain and establish inferior courts, conferred on Congress by Art. III, Sec. 1, of the Constitution. • • • The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good."

As was said in *United States* v. *Classic,* 313 U. S. 299, 61 S. Ct. 1031, 85 L.Ed. 1368:

> "Words of a constitution are not to be read with stultifying narrowness."

A broad yet wholly reasonable construction of the judiciary provisions of the constitution, relating to the judicial power extending to cases arising under the constitution and laws of the United States, obviates any supposed uncertainty and provides a ready solution to the problem of giving reasonable scope and proper effect to the powers of congress to afford courts of justice anywhere in the United States to those peculiar charges among its citizens, those resident or domiciled in the District of Columbia.

It would seem inappropriate to restrict the powers of Congress derived from Art. I, Sec. 8, Cl. 17, by reference to the diversity clause of Art. III, Sec. 2, ignoring the first clause of Art. III, Sec. 2, and thus destroy part of the obvious purpose of the congressional powers in relation to citizens of the District of Columbia. As was said in *Billings* v. *United States,* 232 U. S. 261, 282, 34 S. Ct. 421, 58 L. Ed. 596:

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> "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other."

And in *Dick* v. *United States*, 208 U. S. 340, 28 S. Ct. 399, 52 L. Ed. 520:

> "Fundamental constitutional principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other."

Important in this connection also is the case of *Kansas* v. *Colorado*, 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956, where we read:

> "It is a definite declaration, a provision that the judicial power shall extend to—*that is, shall include*—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on the grant of power, *but if there are any they must be expressed*, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising. • • •
>
> "Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, *no matter who may be the parties thereto.*"

We submit, therefore, that it is as much within the power of Congress to vest United States courts with jurisdiction to hear cases involving District of Columbia citi-

zens under Art. I, Sec. 8, Cl. 17, as to vest such courts with jurisdiction to hear bankruptcy, patent or interstate commerce cases under Art. I, Sec. 8, Cl. 3, 4 and 8, since all these cases arise under the constitution and laws of the United States and *are federal questions* within the meaning of Art. III, Sec. 2.

2.

Art. I, Sec. 8, Cl. 17 vests in Congress power "to exercise exclusive legislation in all cases whatsoever over such district * * * as may * * * become the seat of the government of the United States. * * * "

A. Congress in enacting legislation affecting the District of Columbia or its citizens,

(a) Acts not as a local legislature, but in its one high character as a national legislature;

(b) Creates, not local laws, but laws of the United States, which under Art. VI, Cl. 2 are the supreme law of the land;

(c) Creates laws binding the nation, like acts made in pursuance of other powers, and possessing obligation out of the ten miles square of the District of Columbia;

(d) Exercises power, including not only the powers that belong to Congress in respect of territory within a state, but also the powers of the state as well, a delegation which embraces full and unlimited jurisdiction, subject only to the prohibitions of the Constitution, to provide for the general welfare of citizens of the United States resident within the District of Columbia by any and every act of legislation which Congress may deem conducive to that end.

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What is the character in which Congress acts and what are the scope of its powers in exercising exclusive legislation in all cases whatsoever over the District of Columbia? We have referred to the case of *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 5 L. Ed. 257, where Chief Justice Marshall wrote:

> "*In the enumeration of the powers of congress, which is made in the eighth section of the first article*, we find that of exercising exclusive legislation over such district shall become the seat of government. This power, like all others which are specified, is conferred on congress *as the legislature of the Union;* For, strip them of that character, and they would not possess it. *In no other character can it be exercised.* In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, *it is in that character alone that the constitution confers on them this power of exclusive legislation.* This proposition need not be enforced.
>
> "The second clause of the sixth article declares, that 'this constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land.'
>
> "*The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States.* Those who contend that acts of congress, made in pursuance of this power, do not like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by congress, as the legislature of the Union, is not a law of the United States and does not bind them.
>
> "One of the gentlemen sought to illustrate his proposition that congress, when legislating for the district, assumed a distinct character, and was reduced to a mere local legislature, *whose laws could*

possess no obligation out of the ten miles square, by a reference to the complex character of this court. • • •

"Since congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be any thing in the nature of this exclusive legislation, which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made. • • •

"The solution, and the only solution of the difficulty, is, that the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escapes out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, *that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union.* The American people thought it a necessary power, and they conferred it for their own benefit. *Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual* execution." (Emphasis ours.)

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We have seen that the jurisdiction of federal courts other than the courts of the District of Columbia, in the *Cohens* case, the Supreme Court, and in the *Battle* case, the District Court of the United States for Georgia, were extended to cases arising under laws enacted by congress relating to the District of Columbia, as laws not of a local but as a national legislature whose binding effect reaches to all parts of the United States. So that the position of the lower court that congress may not affect the jurisdiction of the United States courts outside of the District of Columbia by *laws of the United States* relating to the District finds no support in the decisions of the Supreme Court.

We wish to refer to the case of *Kendall* v. *United States*, 37 U. S. (12 Pet.) 524, 9 L. Ed. 1181, where the court says on page 618:

> "But let us examine the act of congress of the 27th of February, 1801, concerning the district of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out. And it is proper, preliminary, to remark, that under the constitution of the United States, and the cessions made by the states of Virginia and Maryland, the exercise of exclusive legislation, in all cases whatsoever, is given to congress. And it is a sound principle, that in every well-organized government, the judicial power should be co-extensive with the legislative, so far, at least, as private rights are to be enforced by judicial proceedings. There is, in this district, no division of powers between the general and state governments. Congress has the entire control over the district, for every purpose of government; * * *."

In *Pollard* v. *Hagan*, 44 U. S. (3 How.) 212, 233, 11 L. Ed. 565, the court said:

> "By the 16th clause of the 8th section of the 1st article of the Constitution, power is given to Congress 'to exercise exclusive legislation in all cases

whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.' Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, *the national and municipal powers of government, of every description, are united in the government of the Union.* And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. * * *"

In *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445, 67 L. Ed. 731, the court said (p. 442):

"By the Constitution, Clause 17, Sec. 8, Article I, Congress is given power 'To exercise exclusive legislation in all cases whatsoever, over' the District of Columbia. This means that as to the District Congress possesses not only the power which belongs to it in respect of territory within a state but the power of the state as well."

To like effect in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147, 9 S. Ct. 256, 257, 32 L. Ed. 637, the court said:

"Over this district congress possesses 'the combined powers of a general and of a state government in all cases where legislation is possible.'"

Likewise in *Capitol Traction Co.* v. *Hof*, 174 U. S. 1, 5, 19 S. Ct. 580, 43 L. Ed. 873, the court said:

"The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government, has the entire control over the

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District of Columbia *for every purpose of government, national or local.* It may exercise within the district all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among the courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." (Emphasis ours.)

On the authority of these, and other cases, quoted in ample notes, the Circuit Court of Appeals for the District of Columbia wrote in its opinion in *Neild* v. *District of Columbia,* 110 F. 2d 246 at page 249, referring to Art. I, Sec. 8, Cl. 17:

"That delegation is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of Government. Within the District of Columbia, there is no division of legislative powers such as exists between the federal and state governments. Instead there is a consolidation thereof, which includes within its breadth all proper powers of legislation. Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. * * *"

See also to this effect, *Kerr* v. *Ross,* 5 App. D. C. 241, 247; *Lansburgh* v. *District of Columbia,* 11 App. D. C. 512, 521; *Moses* v. *United States,* 16 App. D. C. 428, 433;

Curry v. *District of Columbia*, 14 App. D. C. 423, 438; *Gudmundson* v. *Cardillo*, 126 F. 2d 521, 525.

3.

Congress in exercising unlimited sovereign and exclusive powers under Art. I, Sec. 8, Cl. 17, in relation to the citizens of the United States resident in the District of Columbia, in order to provide them those privileges and immunities and to impose upon them those obligations essential to an ordered society of free people, has the function among other things to establish courts of justice with jurisdiction to entertain actions in law or in equity by or against citizens of the United States, residents of the District of Columbia.

A. In exercising this power of providing for the enforcement of private or civil rights of citizens of the United States resident in the District of Columbia by judicial proceeding in courts of the United States, Congress is acting not as a local but as a constitutional national legislature.

B. Congress is not limited in exercising such national sovereign powers, in relation to the citizens of the District of Columbia to vesting solely courts of the District of Columbia with jurisdiction of causes brought by or against such citizens, but may vest all the courts of the United States with such jurisdiction.

C. Congress, as the only sovereign power over citizens of the District of Columbia under Art. I, Sec. 8, Cl. 17, in passing laws respecting their rights and obligations, has discretion, under Art. I, Sec. 8, Cl. 18, in protecting such rights and enforcing such obligations, to vest courts of the United States with such jurisdiction of civil cases

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brought by or against and criminal cases against citizens of the District of Columbia, as Congress deems most eligible and best adapted to attain the object.

Such power of exclusive legislation comprehends not alone the territory of the District of Columbia but the people residing therein as was observed in *Shoemaker* v. *United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170, where the court quoted the language of the Maryland Act of cession as follows (p. 300):

> "• • • 'That all that part of said territory called Columbia, which lies within the limits of this State, shall be and the same is hereby, acknowledged to be forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, *as well of soil as of persons residing or to reside thereon,* pursuant to tenor and effect of the eighth section of the first article of the Constitution of government of the United States.' *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Gibbons* v. *District of Columbia*, 116 U. S. 404.
>
> "Proceedings upon the conclusion that the United States possesses full and unlimited jurisdiction, *both of a political and municipal nature,* over the District of Columbia, we come to a consideration of certain objections, taken in the court below and urged here, to the validity of the statute itself and to the proceedings under it." (Emphasis ours.)

The nature of the powers which inhere in a sovereign state in relation to its people, which powers are vested by the constitution in the Congress affecting the residents of the District of Columbia, we may find referred to in *New York* v. *Miln*, 71 Pet. 102, 9 L. Ed. 648, where the court said (p. 139):

> "• • • That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation;

where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. * * *"

This language as quoted with approval in *Nebbia* v. *New York,* 291 U. S. 502, 523, 54 S. Ct. 505, 78 L. Ed. 940.

In considering what privileges and immunities are in their nature fundamental, in the enjoyment of which the several state governments have in the exercise of their sovereignty undertaken to protect their citizens, and in the enjoyment of which Congress has been vested with power under Art. I, Sec. 8, Cl. 17, to protect the citizens of the United States resident in the District of Columbia, we would like to refer to the case of *Corfield* v. *Coryell,* (C.C. Pa. 1823), 4 Wash. C. C. 371, Fed. Case No. 3,230, approved in *Slaughter-House Cases,* 16 Wall. 36, 75, 97, 21 L. Ed. 394, where the court writes in its opinion:

"The term is to be confined to those privileges and immunities of citizens which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. They may all be comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a

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citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; *to institute and maintain actions of any kind in the courts of the state;* * * *."*

It becomes apparent, upon the above authorities, that Congress is not restricted in its power to protect the privileges and immunities of the citizens of the District of Columbia, except by those limitations of the constitution guaranteeing certain fundamental rights and privileges. When enacting legislation affecting the privileges and immunities of the citizens of the United States in the District of Columbia, Congress acts not as the local legislature of the district, but as a legislature of national character combining the powers of both federal and state governments.

If when enacting legislation as to the privileges and immunities of the citizens of the United States resident in the District of Columbia, the congress were acting only as a *local legislature,* and not as a national legislture, then it might be said that such citizens could exercise and enjoy such privileges and immunities only while within the territorial boundaries of the District of Columbia and not elsewhere. But since the congress is legislating as to the privileges and immunities of the citizens of the United States resident in the District of Columbia, acts in its *national character* with state and federal powers combined, congress may provide by law for the granting and protection of the privileges and immunities of such citizens wherever they may be within the nation, to the extent of the national powers under the constitution.

When reading Art. I, Sec. 8, Cl. 17, providing that congress shall have power

"To exercise exclusive legislation in all cases whatsoever over such district * * *"

not only the territory or geographical boundaries of the district were concerned, but the people resident in the district were concerned. The congress was invested with respect to the district with all the powers of the states *over* their several geographical areas *and over the people* within their boundaries, as well as with all federal powers under the constitution. These include the power to provide for the protection of those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments and which have at all times been enjoyed by the citizens of the United States from the time of their becoming free, independent and sovereign, including the right to institute and maintain actions of any kind in the courts of the United States. Such is the meaning of the words "in all cases whatsoever".

The amendment in question to the Judicial Code, granting such a fundamental right, is a law of the United States, not because Congress enacted it but because Congress *validly enacted it* under the provisions of Cl. 17 and 18 of Sec. 8, Art. I. These provisions delegated to and invested in the United States government as complete, unlimited sovereignty, executive, legislative and judicial, over matters involving its citizens residing in the District of Columbia as the several states have over their respective citizens. Among the powers thus given to Congress is the power to establish a judicial forum for litigation involving the citizens of the District of Columbia. The provision of such a forum is an inherent function of the sovereign. Legislation providing the forum is a law of the sovereign. The sovereign as to the District of Columbia is the United States, not the District of Columbia. (*Metropolitan R. Co.* v. *District of Columbia,* 132 U. S. 1, 9, 10 S. Ct. 19, 33 L. Ed. 231). Laws

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passed by Congress relating to the District of Columbia, including laws providing a forum for its citizens are laws of the United States and not of the District of Columbia. (See *Battle* v. *United States,* above cited.) Because a law enacted by Congress providing such forum is a law of the United States, the forum so selected or established may be any United States District Court, under Art. III of the constitution. A state of the union may not provide a forum outside its limits because it has absolutely no jurisdiction outside its territorial limits. But the federal territorial limits embrace the entire nation as to powers delegated to it, limited with respect to the citizens of the State, but unlimited as to the citizens of the District of Columbia. Thus the judicial powers of the United States are territorially co-extensive with the national boundaries.

It is one of the inherent powers of government and a recognized attribute of sovereignty, that a government may create courts and may grant access of its citizens to its courts to seek justice according to law. An examination of the constitutions of the several states will disclose the recognition of the power of the states to grant to their citizens access to their courts for the protection of their rights and liberties. Since the Congress in legislation dealing with the rights, privileges and immunities of the citizens of the United States in the District of Columbia, who while citizens of the United States are not citizens of any state, is acting as a legislature of the Union with combined powers of the federal and state governments, it would seem reasonable and necessary to conclude that Congress has power under Art. I, Sec. 8, Cl. 17 and 18, to grant to the citizens of the United States in the District of Columbia access to the courts of the United States wherever located.

The effect of the decision of the *Cohens* and *Battle* cases are that the *judicial functions* of the federal government *may be exercised* when authorized by congress *within the national boundaries* for the protection of the privileges and immunities of citizens of the United States resident in the District of Columbia. We do not at all mean that congress may grant to United States citizens resident in the District of Columbia privileges and immunities which may be exercised in the states contrary to state laws, but only that such privileges and immunities as such citizens may have under the federal constitution and laws of the United States, and such as may be granted by the states, may be protected when authorized by Congress, as for instance, by maintaining suits and appeals in the courts of the United States established by Congress within the nation in pursuance of Art. III of the Constitution. What sort of sovereignty would it be that lacked power to grant its citizens access to its courts for the enforcement of such rights?

In support of this proposition we refer also to the case of *O'Donoghue* v. *United States*, 289 U. S. 516, 53 S. Ct. 740, 77 L. Ed. 1356, where it was held that Supreme Court and of the Court of Appeals of the District of Columbia are of equal rank and power with those of the other inferior courts of the federal system and derived judicial power from Art. III of the Constitution, and though created by Congress under the authority of Art. I, Sec. 3, Cl. 17, their judges were nevertheless entitled to the protection of Art. III, Sec. 1, prohibiting diminution of the salary of judges during their continuance in office. On page 538 the court says:

> "• • • The pertinent clause of the Constitution (Art. I, Sec. 8, Cl. 17) confers the power on Congress to 'exercise exclusive legislation • • • over such district • • • as may • • • become the seat of govern-

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ment of the United States.' These are words of permanent governmental power. The District, as the seat of the national government, is as lasting as the States from which it was carved or the union whose permanent capital it became. It could not have been intended otherwise; and it was thus recognized by the act of acceptance in 1790 (Sec. 1, c. 28, 1 Stat. 130): '* * * the (District) is hereby accepted for the permanent seat of the government of the United States.' "

And on pages 539-540:

"Over this District Congress possesses 'the combined powers of a general and of a state government in all cases where legislation is possible.' *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147. The power conferred by Art. I, Sec. 8, Cl. 17, is plenary; but it does not exclude, in respect of the District, the exercise by Congress of other appropriate power conferred upon that body by the Constitution, or *authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable.* Circuit Judge Taft, afterwards Chief Justice of this court, speaking for himself, Judge Lurton, afterwards an associate justice of this court, and Justice Hammond, in *Grether* v. *Wright*, 75 F. 742, 756-757, after reciting the foregoing clause and the organization of the District under it, said:

" 'It was meet that so powerful a sovereignty should have a local habitation the character of which it might absolutely control, and the government of which it should not share with the states in whose territory it exercised but a limited sovereignty, supreme, it is true, in cases where it could be exercised at all, but much restricted in the field of its operation. The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation. In the same article which granted the powers of exclusive legislation over its seat of government, are con-

ferred all the other great powers which make the nation, including the power to borrow money on the credit of the United States. He would be a strict constructionist, indeed, who should deny to congress the exercise of this latter power in furtherance of that of organizing and maintaining a proper local government at the seat of government. Each is for a national purpose, and the one may be used in aid of the other.'

"*Callan* v. *Wilson*, 127 U. S. 540, 550 (8 S. Ct. 1301, 32 L. Ed. 223).

" 'There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases.'

"It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III. We think it is not reasonable to assume that the cession stripped them of their rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union."

While citizens of the District of Columbia are not citizens of a state of the United States and cannot rely upon the laws of any state or upon those provisions of the United States Constitution relating specifically to the rights, privileges and immunities of the citizens of a state *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510, 44 S. Ct.

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177, 68 L. Ed. 414), nevertheless Congress has full and adequate power under Art. I, Sec. 8, Cl. 17-18 to provide for and protect the rights, privileges and immunities of the citizens of the United States resident in the District of Columbia as fully as citizens of the several states of the Union are protected.

The court below in its majority opinion looks upon *O'Donoghue* v. *United States,* 289 U. S. 516, above cited, as supporting the view that Congress cannot grant United States District Courts jurisdiction of cases by or against citizens of the District of Columbia. In that case it was recognized that Congress, by reason of its unlimited constitutional power over the District of Columbia, could grant to the courts of the District of Columbia administrative power beyond the judicial power which it could grant to United States courts elsewhere. We cannot believe that this negates but to the contrary we believe that it supports the converse, that is to say, that Congress has power, by the same unlimited constitutional grant of exclusive legislation over citizens of the District of Columbia, to afford them access and make them subject to the jurisdiction of United States courts everywhere, because such is a grant of judicial not administrative power. In this case the Supreme Court held that Congress had the power and duty under Art. I, Sec. 8, Cl. 17 to protect the citizens of the District of Columbia in every constitutional guaranty including the guaranty of Art. III of an independent judiciary. In other words, the court in the *O'Donoghue* case held that the law providing for the reduction of salaries of District of Columbia judges was a *law of the United States* and therefore affected by the *constitutional guarantee* of Art. IIII against such reduction. If laws establishing courts for the District of Columbia or affecting the salaries of their judges are *laws of the United States,* then a law giving jurisdiction to federal

district courts with respect to the suits by or against citizens of the District of Columbia *is a law of the United States*. For that principle the *O'Donoghue* case is cited by the plaintiff.

The burden of the court's argument in that case was the uninhibited and exclusive powers of Congress to protect the rights and privileges of the citizens of the District of Columbia, not a fear of the limitations of judicial power. The court was not at all concerned with applying technical rules of construction to impair federal jurisdiction but with the living and enduring questions of protecting the rights and privileges of its citizens in the District of Columbia. Since the inhabitants of the District of Columbia could prior to cession to the United States have resorted to United States courts as state citizens in diversity cases, the Constitution, then, by the authority of the *O'Donoghue* and *Callen* cases, was not designed to take away such rights by cession but to transfer power to Congress to protect such rights as part of the congressional power to pass *laws of the United States* within the meaning of Art. III, Sec. 2. Why should there be resistance to affording a judicial forum to District of Columbia citizens in United States courts when it is so plainly supported by reason and authority and when Art. III, Sec. 2, clearly provides the basis for such jurisdiction when it uses the phrase "laws of the United States"? Why deny Congress powers necessary to protect and govern those citizens who are its peculiar and exclusive charge?

The District Courts of the United States are courts of the national government of the United States Courts of the District of Columbia are also courts of the national government of the United States. (*Embry* v. *Palmer*, 107 U. S. 3, 9, 10, 27 L. Ed. 346, 348, 349, 2 S. Ct. Rep.

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25; *Phillips* v. *Negley*, 117 U. S. 665, 674, 675, 29 L. Ed. 1013, 1015, 6 S. Ct. 901; *Moss* v. *United States*, 23 App. D. C. 475, 481-3). Since Congress has power to grant to citizens of the United States in the District of Columbia access to courts of the United States in the District of Columbia, it can properly be said, we submit, that power is vested in Congress under Art. I, Sec. 8, Cl. 17 to grant to such citizens in the District of Columbia access to other courts of the United States.

Since no distinction is made between the courts of the District of Columbia established by Congress under Article I, Sec. 8, Cl. 17, and the inferior courts established by Congress under Art. III, Sec. 1 of the Constitution, as being courts of the United States, it is untenable to make a distinction in the powers of Congress to grant its citizens of the United States in the District of Columbia access to the courts of the United States in the District of Columbia on the one hand, and the powers of Congress to grant to citizens of the United States resident of the District of Columbia access to other courts of the United States other than those of the District of Columbia, on the other.

It is to be noted that under Art. III, Sec. 1, "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." It has been held that the inferior courts referred to in Art. III, Sec. 1, no less include the courts of the District of Columbia than other courts of the United States. (*Embry* v. *Palmer*, 107 U. S. 3, 9, 10, 27 L. Ed. 346, 348, 349, 2 S. Ct. Rep. 25; *Phillips* v. *Negley*, 117 U. S. 665, 674, 29 L. Ed. 1013, 1015, 6 S. Ct. 901; *Moss* v. *United States*, 23 App. D. C. 474, 481).

When Art. III, Sec. 2 provides in part:

> "The judicial power shall extend to all cases in law and in equity arising under this constitution, the laws of the United States * * *"

and when Congress is empowered by Art. I, Sec. 8, Cl. 17 of the Constitution to legislate in all cases affecting the rights and interests of citizens of the United States in the District of Columbia, such legislation so founded constitutes "laws of the United States." By analogy, therefore, Congress has constitutional authority to extend the judicial power of the United States to all cases in law and in equity brought by citizens of the United States of the District of Columbia in the courts of the United States wherever located.

Stated in another way, if the judicial power of the United States extends under Art. III, Sec. 2 to all cases in law and in equity arising under the Constitution and the *laws of the United States,* then since Art. I, Sec. 8, Cl. 17, grants to the Congress the power of determining the rights, privileges and immunities of the citizens of the District of Columbia and to pass laws granting and protecting such rights, the judicial power of the United States extends, when provided by Congress, to the granting to the courts of the United States wherever located of jurisdiction of suits brought by citizens of the District of Columbia.

The Constitution of the United States defines some but does not pretend to state what all the rights, privileges and immunities of the citizens of the District of Columbia are, nor what the rights of the citizens of any state are. In the case of citizens of the states, such other rights, privileges and immunities are determined by the constitutions and laws of the several states, subject to the limitations imposed upon them by the federal constitution. In

case of citizens of the United States resident in the District of Columbia, they are to be determined by Congress, except for the limitations imposed by the federal constitution.

The citizens of the United States resident in the District of Columbia cannot look to any state as being the sovereign upon whom they depend for protection and the exercise of those powers of government which are indispensable to a free people. (*Hooe* v. *Jamieson*, 166 U. S. 395, 17 S. Ct. 596, 41 L. Ed. 1049; *Barney* v. *City of Baltimore*, 73 U. S. (6 Wall.) 280, 18 L. Ed. 825; *Hepburn* v. *Ellzey*, 6 U. S. (2 Cranch.) 445, 2 L. Ed. 332.) They are not the beneficiaries of the state governmental powers except in a negative sense, as the federal Constitution by Amendment XIV prohibits a state from denying to any citizen of the United States due process and the equal protection of its laws. The only sovereign to which a District of Columbia resident may look under Art. I, Sec. 8, Cl. 17, is the United States government and its legislative and judicial processes.

It may be observed that the United States constitution for valid reasons has not left the Congress without power to grant diversity jurisdiction to the federal courts and Congress has not left the citizen of one state only the courts of another state in which to have adjudicated his rights as against the citizens of the other state. It may consistently be observed that the United States constitution has for the same valid reasons vested Congress with the widest and most comprehensive powers in legislating in its national character for the well-being and the privileges and immunities of this unique group of its citizens resident in the District of Columbia, powers of the state and federal governments combined.

It is perfectly reasonable and proper for Congress, in legislating in its national character for the only sovereignty to which a District of Columbia resident is directly subject, to vest its courts wherever located in the United States with jurisdiction to entertain cases between citizens of the United States resident in the District of Columbia and citizens of the several states. In what sense can this be said to be a strain upon our accepted doctrines as to the sovereign powers of a state over its citizens? Quite to the contrary, a sovereign nation acting in its national character, or a sovereign state of the union acting under the high powers of statehood, has as one of its indispensable attributes the establishment of courts of justice in which its citizens may maintain causes for the protection and enforcement of their rights. Would not the proponent of the theory that a sovereign acting in its high capacity, as combining state and federal powers under our constitutional system, is without power to grant to this peculiar and particular group of United States citizens of the District of Columbia access to its national courts wherever Congress has power to establish them, have a most overwhelming if not impossible burden of argument?

In this same connection we should like to call to the attention of the court that among that group of powers which Art. III, Sec. 2 encompasses when it provides that judicial power extends to cases arising under "laws of the United States", are also the following powers granted to Congress in Art. I, Sec. 8:

> "To constitute tribunals inferior to the supreme Court." (Cl. 9)
>
> "To make all laws which shall be necessary and proper for *carrying into execution the foregoing powers*, and *all other powers* vested by this consti-

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tution in the government of the United States, or any *department* or officer thereof." (Cl. 18) (Emphasis ours.)

In the face of grants so broad, it is plain, is it not, that Congress has power in its discretion to enact laws necessary to implement not only the powers described in Art. I, Sec. 8, Cl. 17, to protect the rights and impose obligations upon District of Columbia citizens, but to carry such authority into effect also by passing laws to *implement the powers of the judicial department of the government* to deal with and protect the rights and privileges of the citizens of the District of Columbia over which the United States of America is the only sovereign power. These are great powers that the people and the states of the United States entrusted to the national government. Why should they be whittled away for questionable and unprecedented technical reasons?

It is in the power of Congress to adopt the means in its discretion most eligible and best adapted to give effect to its constitutional prerogatives. The plaintiff submits that this court cannot reasonably hold that granting to citizens of the United States resident in the District of Columbia access to United States courts and granting to United States courts jurisdiction to hear suits by and against citizens of the United States resident in the District of Columbia, lies outside of the discretion of Congress to choose those means most eligible and best adapted to exercise those great powers of exclusive legislation in all cases whatsoever conferred upon Congress by Art. I, Sec. 8, Cl. 17 of the Constitution. In *Logan* v. *United States,* 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, the court observes (p. 283):

"Among the powers which the Constitution expressly confers upon Congress is the power to make all laws necessary and proper for carrying into execution the powers specifically granted to it, and all

other powers vested by the Constitution in the government of the United States, or *in any department* or officer thereof. In the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Julliard* v. *Greenman*, 110 U. S. 421, 440, 441. (p. 293)

"* * * that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object." (Emphasis ours.)

4.

A. The grant of judicial power in Art. III, Sec. 2, in cases arising under "the constitution, the laws of the United States" is independent of and is not limited by the later grant in cases involving "controversies * * * between citizens of different states."

B. The constitutionality of the statute in question rests upon the grant of judicial power extending to cases arising under "the laws of the United States," and this is sufficient.

In order to arrive at the result reached by the lower court it would be necessary to construe that part of Art. III, Sec. 2 reading: "controversies * * * between citizens of different states" as a qualification or limitation upon the first sentence of Art. III, Sec. 2 reading:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, * * *"

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Such a construction is contrary to long established precedent and authority. In *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 5 L. Ed. 257, Chief Justice Marshall wrote (p. 378):

> "The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends all 'cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be an exception, it is to be implied against the express words of the article.
>
> "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' and 'between a state and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

In *The Moses Taylor*, 71 U. S. (4 Wall.) 411, 428, 18 L. Ed. 397, the court in part says:

> "In the opinion delivered in the case of *Martin* v. *Hunter*, Va. 1816, 1 Wheat., U. S. 334, 4 L. Ed. 97, Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited, between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers,

> and consuls, and in case of admiralty and maritime jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to all cases; but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and with respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. • • •"

In *Lincoln Gas & Eletric Light Co.* v. *City of Lincoln*, 250 U. S. 256, 39 S. Ct. 454, 63 L. Ed. 968, the court held that even without diversity of citizenship, if a suit in federal court presents a controversy under the constitution and laws of the United States, the jurisdiction extends to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions. See also *Pope* v. *Louisville N. A. & C. R. Co.*, 173 U. S. 573, 19 S. Ct. 500, 43 L. Ed. 814; *Chesbrough* v. *Woodworth*, 244 U. S. 72, 37 S. Ct. 579, 61 L. Ed. 1000; *Burbank* v. *Bigelow*, 92 U. S. 179, 23 L. Ed. 542.

The whole field of jurisdiction of United States courts in matters involving federal questions would be wiped out if the opinion of the lower court were sound. Cases involving patents, bankruptcy, or interstate commerce, for instance, are within the jurisdiction of United States courts, without diversity of citizenship being present; and such being the case, the diversity clause of Art. III, Sec. 2 is not a limitation on the powers of Congress to vest jurisdiction in United States courts of federal questions in pursuance to the first clause of Art. III, Sec. 2.

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5.

Aside from the above basis for the constitutionality of the amendment of 1940 to Sec. 24(1) of the Judicial Code, a citizen of the United States resident in the District of Columbia may properly be considered as one of the "citizens of different states" within the meaning and purpose of Art. III, Sec. 2 of the constitution of the United States, in the use of the words "between citizens of different states."

Counsel for the plaintiff and petitioner is of the opinion that the position hereinabove taken in Points 1 to 4 as to the constitutionality of the Amendment of 1940 to the Judicial Code is that most likely upon reflection to be judged consistent with the basic political philosophy of the framers of the constitution, with principles of constitutional construction and with reason and precedent.

Consistent with the high respect in which we and the profession generally hold the experience and scholarly attainments of Justice Evans of the Seventh Circuit and Justice Parker of the Fourth Circuit, and consistent with the practically unanimous expressions of the law review writers who have devoted careful study and thorough research to the subject, we feel, however, that it is sound to present also the position that, not in any way contradicting the argument previously made, the constitutionality of the amendment in question may still be upheld, even if we for the time being pay no attention to the first clause of Art. III, Sec. 2 of the constitution and, like many seem to have done, confine our attention to that portion of Art. III, Sec. 2 reading: "Controversies • • • between citizens of different states."

The difficulty here arises from the precedents established in the cases of *Hepburn* v. *Ellzey,* 6 U. S. (2

Cranch) 445, 2 L. Ed. 332; *Barney* v. *City of Baltimore*, 73 U. S. (6 Wall.) 280, 18 L. Ed. 825, and *Hooe* v. *Jamieson*, 166 U. S. 395, 17 S. Ct. 596, 41 L. Ed. 1049, construing previous acts of Congress granting diversity jurisdiction in controversies between "citizens of different states" and holding this phrase to mean only citizens of different states of the Union, as Virginia or California. Now, however, we have a different expression of Congress specifically including citizens of the District of Columbia, Hawaii, Alaska and the territories. This raises the question whether the courts are justified in clinging to the definition of the word "state" in one of its specific senses as meaning one of those states which are admitted to the Union as component parts of the United States of America, or whether the courts by the customary rules of construction are at liberty to consider the word "state" in its generic sense, "a body politic, occupying a definite territory and politically organized under one government." (Webster's Dictionary)

The federal government of the United States is the sovereign state of the United States, to the full extent of its constitutional powers. There are nevertheless bodies politic which are an integral part of the United States which possess certain inherent sovereign powers in and of themselves, only limited by the grant of powers to the federal government. It has been recognized that these bodies politic and political subdivisions of the United States occupy definite territories, are politically organized under their several governments, exercise a broad portion of the general field of sovereignty and are called states. No less is the District of Columbia, which is the seat of the government, a part of the United States, whose sole sovereign is the federal government of the United States, which extends to a definite terri-

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tory and is politically organized. It is a definite political subdivision of the United States, the rights of whose citizens as much depend upon the laws of their domicile as do the rights of the citizens of the states of the Union depend on theirs.

In *Faitoute Co.* v. *Asbury Park,* 316 U. S. 502; 62 S. Ct. 1129; 86 L. Ed. 1629, the court said:

> "The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' • • • Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights. • • • The dividing line will remain obscure if we deal with empty abstract rights instead of wordly gains and losses, if we indulge in doctrinaire talk about 'rights' and 'remedies', instead of giving these concepts a content that carries meaning to the understanding of men. • • •"

The question at issue involves some of the fundamental rights which are commonly recognized by governments of free people, that is to say, the securing of justice for its people as being one of the first duties of government. It is not only the inherent power but the duty of every government, in the exercise of sovereignty over its citizens, to provide the means whereby the rights of such citizens may be vindicated in courts of justice established by the sovereign. In this case, we have the question as to whether such fundamental rights of citizens of the District of Columbia, who are citizens of the United States but who are not citizens of any particular state of the Union, are to be denied such fundamental rights and privileges, when Congress has sought to protect them, upon a limited or narrow definition of the word "State" in the constitutional provisions involved. If greater attention is given to the fundamental constitutional principles upon which our government is founded, one of them being the equality of citizens in

their rights, privileges and immunities before the law and in courts of justice, than to the technical matter of making a choice among the several recognized definitions of the word "state" we will conclude that we are on sounder ground of constitutional construction, if we apply such definition as will result in the recognition and in the protection of such fundamental rights. (*United States* v. *Classic,* 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368; *Dick* v. *United States,* 208 U. S. 340, 28 S. Ct. 399, 52 L. Ed. 520; *Billings* v. *United States,* 232 U. S. 261, 282, 34 S. Ct. 421, 58 L. Ed. 596; *Kansas* v. *Colorado,* 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956.) Where a choice among the accepted definitions of the word "state", that of a narrow and specific sense, will deny to large numbers of our citizens the protection of these fundamental rights, whereas a choice of another definition of the word "state", that of a broader sense, will result in the recognition and in the protection of such fundamental rights, is it not more consistent with the spirit and purpose of the Constitution to accept and apply the definition which assures to citizens the equal protection of the fundamental rights for which free governments are formed? Let us examine this question.

Where words in the Constitution have "• • • full operation without • • • giv(ing) them • • • an exclusive sense • • • •" and "where a negative construction" • • • would destroy some of the most important objects for which the power was created, • • • (they) ought not to be construed negatively." (*Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264, 395, 5 L. Ed. 257.) If the end desired by Congress is legitimate and within the scope of the Constitution, all appropriate means which are not prohibited by that instrument are constitutional. (*McCulloch* v. *Maryland,* 17 U. S. (4 Wheat.) 316, 421, 4 L. Ed. 579.) Thus, since the end served by the 1940 Amend-

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ment is to provide for the welfare of the citizens of the District under U. S. Const. Art. I, Sec. 8, cl. 17 and the means is not *expressly* prohibited by Art. III (see 29 Geo. L. J. 193, 199; *Williams* v. *United States*, 289 U. S. 553, 566, 53 S. Ct. 751, 77 L. Ed. 1372; *Neild* v. *District of Columbia*, 110 F. 2d 246, 250) the constitutionality of the statute should be sustained.

The question whether or not the District of Columbia is to be treated as a "state" within the terms of the Constitution has not been uniformly decided. Commerce between a state and the District of Columbia has been held to come under the "commerce clause." (U. S. Const. Art. I, Sec. 8, cl. 3; *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, 23 S. Ct. 214, 47 L. Ed. 333; *Stoutenbaugh* v. *Hennick*, 129 U. S. 141, 9 S. Ct. 256, 32 L. Ed. 637; *Neild* v. *District of Columbia*, 110 F. 2d 246.) "Full faith and credit" (U. S. Const. Art. IV, Sec. 1) must be accorded to judgments of the courts of the District. (*Embry* v. *Palmer*, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346.) Right of trial by jury is guaranteed to citizens of the District by U. S. Const. Art. III, Sec. 2, Cl. 3 and Amend. VI. (*Callan* v. *Wilson*, 127 U. S. 540, 8 S. Ct. 1301, 32 L. Ed. 223; *Geofroy* v. *Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642.) District of Columbia has been held to be a state within the meaning of a treaty granting certain rights to aliens within "States of the Union." Ill. Rev. Stat. (1947) Ch. 131, Sec. 1.14, provides that the word "state" may be construed to include the District of Columbia. But it has been held (*Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 10 S. Ct. 19, 33 L. Ed. 231) that the District is a municipal corporation. And Amendment XIV to the Constitution has been held not to apply to the District (*Wight* v. *Davidson*, 181 U. S. 371, 384, 21 S. Ct. 616, 45 L. Ed.

900; *Neild* v. *District of Columbia*, 110 F. 2d 246, 256). Thus the right of suffrage is not guaranteed to its citizens under the Constitution Art. XIV, Sec. 2. (*Heald* v. *District of Columbia*, 259 U. S. 114, 124, 42 S. Ct. 434, 66 L. Ed. 852.) The cases are not consistent as to whether or not the term may include the District. But the weight of the cases, however, appears to treat the district as a "state".

In *Talbott* v. *Board of Silver Bow County*, 139 U. S. 438, 444, 11 S. Ct. 594, 35 L. Ed. 599, the court observed:

> "Still further, while the word State is often used in contradistinction to Territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. • • • On the face of the language, the word 'State' would seem to refer, not to political communities in general, but to those particular communities which form the States of the Union; yet it was held to include the District of Columbia, this court, by Mr. Justice Field, observing: 'This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, Secs. 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the

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government of the United States, is as much a State as any of those political communities which compose the United States.'"

In *Busby* v. *Electric Utilities Employers Union*, 323 U. S. 72, 89 L. Ed. 78, 65 S. Ct. 142, the court said (p. 73):

> "By Rule 81 (3) the 'law of the state' in proceedings in the District Court of the United States for the District of Columbia is 'the law applied in the District of Columbia.' That law is derived from the common law and statutes of Maryland in force at the time of the cession of the District to the United States, as modified by statutes of Congress and as determined and developed by the courts of the District. Act of February 27, 1801, 2 Stat. 103; *Armstrong* v. *Lear*, 12 Wheat. 169, 176; *McKenna* v. *Fisk*, 1 How. 241, 249."

A strong inclination to consider the District of Columbia a state in the generic sense is contained in the opinion of *Metropolitan Rd.* v. *District of Columbia*, 132 U. S. 1, 9, 10 S. Ct. 19, 33 L. Ed. 231, wherein the court said:

> "One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of *Hepburn* v. *Ellzey*, 2 Cranch, 445, 452, where the question as to whether a citizen of the District could sue in the circuit courts of the United States as a citizen of a state. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word 'State' in the Constitution, where it extends the judicial power to cases between citizens of the several 'States,' refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sov-

ereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when in the *Bank of Alexandria* v. *Dyer*, 14 Pet. 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be 'beyond the seas,' or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws."

It has been held that decisions interpreting statutory language should not be precedent for construction of similar language found in the Constitution. In connection with the Federal Interpleader Act, the Supreme Court has specifically reserved the question of whether the constitutional phrase 'between citizens of different states' has a broader meaning than has been applied to its statutory equivalent. (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 71, 60 S. Ct. 44, 47, 84 L. Ed. 85 1939).) Traditionally, constitutional language is given a broader meaning. In discussing the effect of the interpretation of statutory language upon the same wording found in the Constitution, one writer said, "The best reply • • • is, that constitutional language may be properly given a

wider interpretation than statutory language. Since the Constitution has a broader purpose than a statute and is intended to last for a much longer time, its wording should possess a flexibility which is not needed in a statute." (Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L. Jour. 377, 395 (1940).) See *Lamar* v. *United States*, 240 U. S. 60, 65, 36 S. Ct. 255, 257, 60 L. Ed. 526 (1916).)

There has been little dissent from the proposition that political subdivisions as well as "natural" persons are "citizens" of the state within which they are situate or domiciled as the case may be within the meaning of that section of the Judicial Code and the related constitutional provision which extend federal jurisdiction to cases involving citizens of different states. (*Cowles* v. *Mercer County*, 74 U. S. (7 Wall.) 118, 19 L. Ed. 86 (1869); *Lincoln County* v. *Luning*, 113 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890); *Port of Seattle* v. *Oregon & W. R. Co.*, 255 U. S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).)

In 11 George Washington Law Review, 258, 259, referring to *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa. 1942), the author says:

> "• • • The incongruity of resorting to the fiction of holding the City of Bethlehem to be a 'citizen' of the Commonwealth of Pennsylvania for the purpose of satisfying a jurisdictional requirement of diverse citizenship and refusing, at the same time, to apply the fiction to the District of Columbia as a 'state' for the same purpose is quite evident, and a careful analysis of the cases supporting these opposite propositions fails to dispel the aura of arbitrariness which pervades them. • • •"

A county in Missouri was classified as a citizen of that state for the purpose of subjecting it to a suit in the federal court (*McPike* v. *Lincoln County*, 7 Cent. L. J. 264

(quoted in *Cunningham* v. *Ralls County*, 1 Fed. 453 (C.C. E.D. Mo. 1880)), where the court said:

> "We cannot assent to the conclusion that it is within the power of a state to create political bodies capable of contracting debts with citizens of other states, and yet privileged against being compelled to pay those obligations by suit in the National Courts."

In another case the court employed similar terms in treating a county as a "citizen" for jurisdictional purposes, saying: "This right to contract implies liability to suit by a citizen of another state, and this gives jurisdiction to the federal courts." (*Hoover* v. *Crawford County*, 39 Fed. 7 (C.C. Ark. 1889), citing *Cowles* v. *Mercer County*, 74 U. S. (7 Wall.) 118, 19 L. Ed. 86.) If the argument is tenable in these cases, it applies with equal or greater force to citizens of the District of Columbia and the territories of Hawaii and Alaska, who enjoy equal rights to contract and are subject to parallel duties. Neither the term "citizen" nor the word "state" connotes a single and restricted meaning in all of the various places in which it is employed in the Constitution. Thus, a corporation, though a "citizen" for the purpose of jurisdiction is not a "citizen" within the contemplation of the privileges and immunities clause. (*Paul* v. *Virginia*, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357 (1869); *Pembina Consol. Min. Co.* v. *Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650 (1888).) "The word 'state' is used in the Constitution more than forty times. Uniformity is lacking in the various cases determining whether or not the District of Columbia and the territories are, or are not, 'states' within the meaning of the different sections. All that can be said is that for some purposes they are, for others they are not." (29 Geo. L. J. 193 at 195) Citizens of the District of Colum-

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bia do not possess the privilege accorded citizens of the "states" of voting in national elections, but the District may be taxed directly in proportion to the census in the same manner as the states. (*Heald* v. *District of Columbia,* 259 U. S. 114, 42 S. Ct. 434, 66 L. Ed. 852; *Loughborough* v. *Blake,* 18 U. S. (5 Wheat.) 317, 5 L. Ed. 98.)

The manifest purpose of the constitutional provision conferring jurisdiction on the federal courts in cases involving citizens of different states was to secure the citizens against local prejudice which might injure him if he were compelled to litigate controversies in the tribunals of his adversary's state. (*Polk's Lessee* v. *Wendell,* 18 U. S. (5 Wheat.) 293, 5 L. Ed. 92; *Whelan* v. *N. Y. R. Co.,* 35 Fed. 849), or, as Hamilton put it, "• • • it is essential to the peace of the Union," and "• • • whatever practices may have a tendency to disturb the harmony between the states are proper objects of Federal superintendence and control." (The Federalist (Hamilton), Lodge Edition, Ch. LXXX, pp. 496-7.)

It is evident that a more realistic approach to the question of the rights of citizens of the District of Columbia and the territories of Alaska and Hawaii to visit the fountains of federal justice by the same route which is open to citizens of the several states is requisite to give life and vigor to the principles of equality of privilege and freedom from discrimination which is the inalienable right of all citizens of the United States.

In an interesting article in the Nebraska Law Review, March, 1948, a thorough study was made of the constitutionality of the amendment of 1940 to the Judicial Code, from which we would like to quote:

> "Only the Hepburn case undertook to construe the word 'state' as used in Article 3. All subsequent decisions were based on the *Hepburn* ruling,

and in no other case was the question re-examined by the Supreme Court. Some lower courts expressed difficulty in understanding the validity of the interpretation in the *Hepburn* case. See, *U. S. ex rel. Champion* v. *Ames*, 95 Fed. 453 (C.C. N.D. Ill. 1899); *Watson* v. *Brooks*, 13 Fed. 540 at 543 (C.C. Ore. 1882), cited *supra* note 16. It is therefore important to examine the reasoning employed in the *Hepburn* case. In that case Marshall cited passages from Articles 1 and 2 and concluded the word 'state' was used to mean a member of the American Confederacy only. He stated,

> 'When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.
>
> 'Other passages from the Constitution have been cited by the Plaintiff to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.' (*Hepburn* v. *Ellzey*, 2 Cranch 445, 453.)

Thus, Marshall expressed his belief the word 'state' was used in the Constitution only to mean a member of the Union. His conclusion was not founded on any interpretation of Article 3 but on the conviction that the word 'state' was used in its narrower meaning throughout the Constitution, and, *a fortiori*, was employed in that sense in Article 3, Section 2. It would therefore follow that any later case which interprets 'state', as used in the Constitution, more broadly, has overruled the premises upon which the Chief Justice's conclusion was based, nullified the long line of cases which mechanically accepted his conclusion, and reopened the problem for judicial interpretation. * * *

"But perhaps the clearest example of the impossibility of imputing a single, simple meaning to the word 'state' is found in the case of *Downes* v. *Bidwell*,

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182 U. S. 244 (1901). There the court was called upon to determine whether the territory of Puerto Rico was embraced within the word 'state' as used in two constitutional provisions: Art. 1, Sec. 8, Cl. 1, which declares, '• • • but all Duties, Imposts and Excises shall be uniform throughout the United States,' and Art. 1, Sec. 9, Para. 6, which reads, '• • • nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.' The Foraker Act, which imposed the duties in question, was held constitutional by a divided court, which stated that Puerto Rico was not within the protection of those sections since it was an 'unincorporated territory.' It was clear that had Puerto Rico been an incorporated territory a contrary result would have been reached. The four dissenting justices felt the Act was unconstitutional and that the distinction between incorporated and unincorporated territories was without merit.

"Significant, too, is the fact that despite the early precedent set by Marshall's definition of 'state', the courts have liberally construed the word as used in treaties (*Geofroy* v. *Riggs*, 133 U. S. 258 (1889); *cf. Ex parte Heikich Terui*, 187 Cal. 24, 200 Pac. 955 1921) where 'territories of the United States' was held to include states) and congressional enactments. *Laughlin* v. *Poucher*, 127 Conn. 447, 17 A. (2d) 767 (1941); *The Ullock*, 19 Fed. 207 (D.C. Ore. 1884); *Trery* v. *Olcott*, 4 Conn. 442 (1823); 36 O.A.G. 59 (1912); *Alesna* v. *Rice*, 74 F. Supp. 865 (D.C. Hawaii 1947). *Contra: Smith* v. *U. S.*, 1 Wash. Terr. Rep. 262 (1869); *Houston East & West Tex. Ry. Co.* v. *Inman, Akers & Inman*, 63 Tex. Civ. App. 556, 134 S. W. 275 (1911). Another interesting comparison lies in the status of the southern states immediately following the Civil War. See: *Texas* v. *White*, 74 U. S. 727 (1869) where it was held Texas was a state within the meaning of Art. 3, Sec. 2 ('in which a state shall be a party') despite the fact Texas had seceded and was, at the time of the suit, gov-

erned as a conquered province, and, of course, has no representatives in Congress (a criterion on which much stress was placed in the *Hepburn* case)."

The several law review articles which have been helpful in dealing with this Point 5 are listed as follows:

The Constitutionality of the 1940 Extension of Diversity Jurisdiction, 55 Yale Law Journal 600;

Federal Procedure—Diversity of Citizenship as Applied to Citizens of the District of Columbia and Territories, 5 Louisiana Law Review 478;

Diversity of Citizenship Clause Extended, 29 Georgia Law Review 193;

Federal Jurisdiction—Constitutional Law, 11 George Washington Law Review 258;

Federal Procedure — Diversity Jurisdiction — 1940 Amendment, 21 Texas Law Review 83;

The 1940 Amendment to the Diversity of Citizenship Clause, 21 Tulane Law Review 171;

Federal Jurisdiction—Constitutional Law—District of Columbia, XLVI Columbia Law Review 125;

Diversity of Citizenship Clause Extended, 29 Georgetown Law Journal 193;

Washingtonians and Rumanians, Nebraska Law Review, March, 1948.

WHEREFORE, the plaintiff and petitioner respectfully suggests to the court that the Circuit Court of Appeals for the Seventh Circuit was in error in holding unconstitutional that portion of Sec. 24(1) of the Judicial Code as amended by Congress in 1940, 54 Stat. 143, 28 U.S.C.A. Sec. 41(1), extending the jurisdiction of United States

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District Courts to cases "between citizens of different states or citizens of the District of Columbia, the territory of Hawaii or Alaska and any state or territory"; and that the judgment of the Circuit Court of Appeals for the Seventh Circuit in the case at bar ought to be reviewed by the Supreme Court of the United States on certiorari.

Conclusion.

It is therefore respectfully submitted that, by reason of the foregoing, a Writ of Certiorari should be granted herein and that this Court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit and reverse the same and remand the cause for further proceedings as to this Court shall seem proper.

Respectfully submitted,

THOMAS G. McBRIDE,
GEORGE E. BILLETT,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 43

CENTRAL STATES COOPERATIVES, INC., a corporation,

Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY, INC., a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI.

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INDEX.

	PAGE
Summary of the Argument	i
Statement	1
Argument	4
Conclusion	12

Summary of the Argument.

1. The controversy between the parties hereto has not now become moot and there presently exists a real controversy involving substantial rights between the parties, under the laws of the State of Illinois which determine the substantive rights of the parties in this cause.

(a) Maintaining the validity of the judgment as a final adjudication of the plaintiff's right of possession at the time of the commencement of the suit is essential in subsequent litigation between the parties. This right and the right to recover on the appeal bond are presently existing and substantial rights plaintiff is seeking to protect by this petition for certiorari.

2. Upon this controversy the petitioner here was denied a hearing on the merits of the appeal in the Circuit Court of Appeals, not because the Circuit Court of Appeals held there was no longer a substantial controversy involved, but because the Circuit Court of Appeals held the statute in question unconstitutional and held that the trial court was without jurisdiction of the matter.

3. The effectual relief which the petitioner here seeks is the reversal of the judgment of the Circuit Court of

Appeals so that the petitioner may seek the affirmance of the judgment of the trial court.

TABLE OF CASES CITED.

Bell v. Bruhn, 30 Ill. App. 300, 301 5

Daggitt v. Mensch, 41 Ill. App. 403, 405, aff. 141 Ill. 395, 31 N. E. 153 6

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487 ..... 4, 5

Glanz v. Ziabek, 233 Ill. 22, 25, 84 N. E. 36 8

Golden v. Menker, 132 Ill. App. 25, 29 8

Hammond v. Doty, 184 Ill. 246, 56 N. E. 371 9

Hickox v. Armstrong, 181 Ill. App. 107, 109 6

Hooper v. Buvidas, 239 Ill. App. 596 9

Johnson v. Shinkle, 50 Ill. 137, 138 7

Mills v. Graves, 44 Ill. 50, 51 7

Palmer v. Frank, 169 Ill. 90, 48 N. E. 426 9

Patterson v. Graham, 40 Ill. App. 399, 404, aff. 140 Ill. 531, 30 N. E. 460 6

Pearson v. Herr, 53 Ill. 144 9

Smith v. Hollenback, 51 Ill. 223 9

Stoddard v. Illinois Improvement & Ballast Co., 271 Ill. 98, 110 N. E. 870 9

West Side Trust & Savings Bank v. Lopoten, 358 Ill. 631, 193 N. E. 462 9

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 748

CENTRAL STATES COOPERATIVES, INC.,
a corporation,
Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY,
INC., a corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI.

May It Please the Court:

STATEMENT.

Your petitioner respectfully states to the Court that the defendant in this case employed the processes and procedures of the Federal Courts for the purpose of retaining possession of the plaintiff-petitioner's premises, thereby causing to the plaintiff-petitioner herein substantial

losses of rent, damages and costs. These are now sought to be recovered from the defendant in an entirely separate action at law in the state court, referred to in respondent's brief in opposition, Exhibit 2, page 16.

The plaintiff commenced its action in the state court for possession of the premises in question on October 2, 1946. On defendant's petition the cause was removed to the federal district court and there proceeded to judgment on December 23, 1946 in plaintiff's favor. The defendant prosecuted an appeal, during the pendency of which the plaintiff on July 14, 1947 sold and conveyed the premises in question to Yellow Terminals, Inc. But the defendant did not surrender possession to such grantee until December 4, 1947.

The defendant, in prosecuting its appeal from the judgment for possession, rendered against it in the case at bar in the District Court of the United States, filed an appeal or supersedeas bond in the amount of $20,000.00 (R. 149, 150), specifically to indemnify the plaintiff against such losses. The defendant now seeks to escape the binding effect of this judgment and the liability on that bond.

The substantial issues and matters in controversy involved in this case are, first, the right of the plaintiff to maintain the validity of the judgment of the trial court adjudicating in its favor its right to possession on October 2, 1946, of the premises in question, rendered at a time, December 23, 1946, when the defendant was still forcibly withholding possession of the premises from the plaintiff; and, further, the right of the plaintiff to recover upon the appeal bond the rent, damages and costs sustained by the plaintiff by reason of not being let into

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possession under the judgment of the District Court during the pendency of the appeal.

The validity of the judgment is vital to the petitioner as a final adjudication of its right to possession on October 2, 1946, so that this question shall not have to be retried. The judgment is also of vital concern to the plaintiff because of the plaintiff's position and obligation on its warranty deed to its grantee. The bond is of substantial importance as assurance of the collectibility of such rent, damages and costs for which the defendant may be found liable.

ARGUMENT.

I.

The controversy between the parties hereto has not now become moot and there presently exists a real controversy involving substantial rights between the parties, under the laws of the State of Illinois which determine the substantive rights of the parties in this cause.

(a) Maintaining the validity of the judgment as a final adjudication of the plaintiff's right of possession at the time of the commencement of the suit is essential in subsequent litigation between the parties. This right and the right to recover on the appeal bond are presently existing and substantial rights plaintiff is seeking to protect by this petition for certiorari.

The substantive rights of the parties to this cause are determined by the laws of the State of Illinois, where the property in question is located and where the contractual relations between the parties, if any, were entered into. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 82 L. Ed. 1188, 58 S. C. 817, 114 A. L. R. 1487.

The circumstances in the relationship of the parties in the case of *Heitmuller* v. *Stokes,* 256 U. S. 359, cited by the respondent, may well have been such, under the laws of the District of Columbia where the action arose, as to have brought to an end, by reason of the sale by the plaintiff of the property there in question, the controversy between the parties as to the possession of the premises. In such case, of course, the issue as to the right of possession became moot. But it does not follow in all cases,

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where the plaintiff in a suit for possession may have sold and conveyed the property involved after judgment in his favor, that the plaintiff should be held to have surrendered or waived the right to maintain the validity of a judgment for possession against reversal on appeal.

In the circumstances of the case at bar, the question of the right of the plaintiff to the possession of the premises on October 2, 1946, when the suit was brought, is still a matter of important substantive right between the parties under the laws of the State of Illinois. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

The issue before the trial court was the plaintiff's right to possession at the time of the commencement of the suit on October 2, 1946. The judgment entered on December 23, 1946 adjudicated the plaintiff's right to possession of the premises on the date of the commencement of the suit. Such issue is still the principal issue on the merits of this case, and is the right which the plaintiff was defending as appellee in the Circuit Court of Appeals. It is the rule in Illinois that a conveyance by the plaintiff, in a suit for possession of certain property, will not defeat the plaintiff's right to maintain the validity of its judgment for possession against reversal on appeal

In *Bell* v. *Bruhn*, 30 Ill. App. 300, the court says, page 301:

> "After the suit was commenced, the appellee conveyed the premises, so that his right to the possession had terminated *pendente lite*. He was, however, at the commencement of the suit, entitled to the possession and his recovery inures to the benefit of his grantee. So held in ejectment; *Mills* v. *Graves*, 44 Ill. 50; and one of the reasons there assigned is that it is the policy of this State to promote the easy sale and conveyance of land, and not to prevent such con-

veyance during the long period which may be consumed in litigation. That reason applies to suits of this character with, at least, part of the force that it does to ejectment. No good would result from a contrary doctrine."

In *Daggitt* v. *Mensch*, 41 Ill. App. 304, affirmed 141 Ill. 395, 31 N. E. 153, the court said, page 405:

"We have held that a conveyance *pendente lite* by the plaintiff in an action of forcible detainer, does not affect his right to recover, if at the commencement of the suit he was entitled to the possession. *Bell* v. *Bruhn*, 30 Ill. App. 300. And the same result attends any change of possession. *Patterson* v. *Graham*, 40 Ill. App. 399."

In *Hickox* v. *Armstrong*, 181 Ill. App. 107, the court says at page 109:

"The law is well settled in this state, that where the possession of property is delivered to the plaintiff in an action of forcible detainer, after the institution of the suit, in the absence of proof of settlement, the plaintiff may still prosecute the action to judgment."

In *Patterson* v. *Graham*, 40 Ill. App. 399, affirmed 140 Ill. 531, 30 N. E. 460, the court said, page 404:

"It is also contended that appellee had no right to a judgment, for the reason that while the action was pending, the possession of the premises was delivered up by the delivery of the key thereof to appellee's counsel. There is no evidence that the key was offered or received as a compromise of the forcible detainer proceeding, and without such intention, receiving a surrender of premises pending such a proceeding, would not terminate the suit. The proceeding is to determine plaintiff's right to the possession at the time it was commenced, and he could not assert in the case a right to possession, which did not accrue until after the action was begun. The judgment re-

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lates to the right of possession, which was claimed when the proceeding was instituted, and it is for the withholding of the possession against such right wrongfully that the signers of the appeal bond became liable. A plaintiff has the right to pursue his proceeding to judgment, after he has, pending the action, obtained possession, for the purpose of fixing liability on the appeal bond for the wrongful detention of the premises. *Bell* v. *Bruhn*, 30 Ill. App. 300."

The same rule has applied in Illinois to actions of ejectment. In *Johnson* v. *Shinkle*, 50 Ill. 137, an action of ejectment was commenced and it appeared that subsequent to the filing of the suit, the plaintiff had sold and conveyed the land in controversy. The defendant objected that the plaintiff was no longer entitled to the premises. The court said, page 138:

"The question presented by this record was decided at the April term, 1867, in *Mills* v. *Graves*, 44 Ill. 50. We there held that a conveyance by the plaintiff in an action of ejectment, pending the suit, would not defeat his right of recovery, which would enure to the benefit of his grantee.

"The circuit court should have rendered a judgment for the recovery of the possession, and that the plaintiff have his writ of *habere facias possessionem*."

In *Mills* v. *Graves*, 44 Ill. 50, the court says, page 51:

"It cannot have been the intention of the legislature to prevent the conveyance of lands during the long period through which the plaintiff in ejectment may often be kept in the courts, although the owner of a clear paramount title; and this may be asserted with the more confidence in view of our short statutes of limitation, under whose operation the grantee of a plaintiff in ejectment, or a purchaser under judgment and execution against the plaintiff, might be often barred from prosecuting a new suit. Neither can we discover any practical objection to allowing

a plaintiff in ejectment to recover, notwithstanding a conveyance pending the suit. The recovery would be under the title upon which the suit was brought, and would practically inure to the benefit of his grantee. To allow the recovery would also be in strict conformity to the issue made by the pleadings."

In *Golden* v. *Menker*, 132 Ill. App. 25, on page 29 the court says:

"Certain questions were asked the witness Clemens by appellant's attorney, on cross-examination, for the purpose, as is indicated by the argument of appellant's counsel, of proving that appellee, at the time of the trial, was not entitled to possession of the premises. Objections to these questions were properly sustained. The material question was, whether appellee was entitled to possession when he brought suit, and notwithstanding he may have conveyed all his interest to a third person after suit brought, the suit might properly proceed to judgment in his name for the benefit of his grantee. *Bell* v. *Bruhn*, 30 Ill. App. 300; *Daggitt* v. *Mensch*, 41 *ib.* 403."

In *Glanz* v. *Ziabek*, 233 Ill. 22, 84 N. E. 36, on page 25 the court says:

"It is further contended that since the commencement of this suit the plaintiffs have conveyed said premises, and that fact alone, it is said, is a bar to plaintiffs' right to recover. In *Mills* v. *Graves*, 44 Ill. 50, this court held that it was sufficient for the plaintiff to show, in ejectment, that he was entitled to recover the premises sued for at the time of the commencement of the suit, and that a conveyance to a third party by a plaintiff, pending the action, would not defeat the action, and that a recovery by the plaintiff in such case would inure to the benefit of his grantee. The doctrine of that case was approved in *Johnson* v. *Shinkle*, 50 Ill. 137, and in *Converse* v. *Dunn*, 166 id. 25, and is the settled law of this State."

Moreover, in an action of forcible detainer, under the statutes of the State of Illinois (Ill. Rev. Stat. 1945, Chap. 57, Sec. 2), as was held in *Hammond* v. *Doty*, 184 Ill. 246, 56 N. E. 371, only the immediate right of possession is involved and the title to the premises cannot be called in question.

In *Palmer* v. *Frank*, 169 Ill. 90, 48 N. E. 426, the court held that the defendant must not attempt to try title but must attack the plaintiff's right to possession. It has been further held in a number of Illinois cases that the question in an action of forcible detainer is not in whom is the title to the premises, but is one of possession and the right to possession. *Smith* v. *Hollenback*, 51 Ill. 223; *Pearson* v. *Herr*, 53 Ill. 144; *Hooper* v. *Buvidas*, 239 Ill. App. 596.

It was further held in *Stoddard* v. *Illinois Improvement & Ballast Co.*, 271 Ill. 98, 110 N. E. 870, that a freehold was not involved in a case of forcible entry and detainer. It has also been held in *West Side Trust & Savings Bank* v. *Lopoten*, 358 Ill. 631, 193 N. E. 462, that the right to possession is all that is involved or can be determined in proceedings under the forcible entry and detainer act of the State of Illinois.

The mere fact that the defendant has shown that the plaintiff has conveyed the premises in question and that the grantee of the plaintiff has belatedly been admitted by the defendant to possession of the premises, ought not deprive the plaintiff of its right to maintain on appeal the validity of the judgment previously rendered in favor of the plaintiff for possession of the premises. Moreover, the defendant is liable upon its appeal bond for the payment to the plaintiff of the reasonable rental value of said premises, damages and costs during the period when the defendant unlawfully detained posses-

sion of the premises from the plaintiff, for which to date the defendant has paid to the plaintiff nothing.

We believe that the plaintiff is entitled to observe that it would be a travesty on justice and an abuse of the process of the federal courts, if the defendant could by the very delays occasioned by the defendant in these proceedings, defeat the substantial rights of the plaintiff; if the defendant can have compelled the plaintiff to bear the heavy financial burdens of the premises while escaping liability on its appeal bond; and if it can have compelled the plaintiff not to have conveyed the premises on pain of the reversal of the judgment of the trial court. It would seem to the plaintiff a strange conclusion of the case, after the plaintiff had obtained a judgment for possession, were such judgment vacated and the suit dismissed because later the plaintiff conveyed title to its property. The plaintiff went to great pains and expense to secure an adjudication of the trial court that it was entitled to possession of the premises on October 2, 1946. The defendant has shown no reason why the plaintiff should not have and be entitled to the benefit of such adjudication. The plaintiff, therefore, respectfully submits that under the laws of the State of Illinois and the facts of this case, the issues in this cause have no become moot, and that there are substantial issues which are still the subject matter of this litigation.

II.

Upon this controversy the petitioner here was denied a hearing on the merits of the appeal in the Circuit Court of Appeals, not because the Circuit Court of Appeals held there was no longer a substantial controversy involved, but because the Circuit Court of Appeals held the statute in question unconstitutional and held that the trial Court was without jurisdiction of the matter.

It was the interjection, for the first time, by the defendant, while the case was pending in the Circuit Court of Appeals on the merits of the defendant's appeal, of the constitutional and jurisdictional question which resulted in depriving the plaintiff of the right to seek the affirmance of its judgment. If upon *certiorari* such statute should be found constitutional, the plaintiff would then be entitled to a hearing and disposition in the Circuit Court of Appeals of the appeal on the merits which involve rights substantial to the plaintiff. Having involved the plaintiff in the toils of federal procedural and constitutional questions, in what originally was a summary proceeding for possession, the defendant now seeks to raise itself by its own persistent unlawful conduct out of the effect upon it of the adjudication against it and out of liablility on its bond.

III.

The effectual relief which the petitioner here seeks is the reversal of the judgment of the Circuit Court of Appeals so that the petitioner may seek the affirmance of the judgment of the trial Court.

To have been so summarily ousted by the Circuit Court of Appeals from the federal courts to which the defendant took the plaintiff over its objection, when the defendant was no longer pleased with the results there, on the grounds of the unconstitutionality of the Act invoked by the defendant on removal, is the grievance against which the plaintiff herein seeks effectual relief.

Conclusion.

It is therefore respectfully submitted that, by reason of the foregoing, a Writ of Certiorari should be granted herein and that this Court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit and reverse the same and remand the cause for further proceedings as to this Court shall seem proper.

Respectfully submitted,

THOMAS G. MCBRIDE,
GEORGE E. BILLETT,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1947.

No. [redacted] 43

CENTRAL STATES COOPERATIVE, INC.,
A Corporation,
Petitioner,

vs.

WABASH MOTOR TRANSPORTATION COMPANY, INC.,
A Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Summary of Argument	4

ARGUMENT.

I. The Court having granted certiorari in a case involving the identical question of law involved in this petition, any argument on the question of law seems inappropriate	5
II. The controversy between the parties to this petition is no longer substantial nor can this Court grant the petitioner effectual relief should it grant certiorari	6
Conclusion	13

CITATIONS.

Cases.

Bell v. Bruhn, 30 Ill. App. 300, 301	8
Brown v. Fletcher, 237 U. S. 583	11
Daggitt v. Mensch, 41 Ill. App. 403, 405	8
Erie Railroad Co. v. Tompkins, 304 U. S. 64	8

Furness, Withy & Co. v. Yang-Tsze Ins. Assn., 242 U. S. 430, 431 11

Gulf Col. & S. F. Ry. Co. v. Dennis, 224 U. S. 503, 508 12

Heitmuller v. Stokes, 256 U. S. 359, 361 4

Helebrant v. Sebesta, 236 Ill. App. 461, 463 9

Mills v. Green, 159 U. S. 651, 653 12

National Mutual Life Insurance Company of the District of Columbia v. Tidewater Transfer Company, Incorporated, Docket No. 640, October Term, 1947.. 8

Rorick v. Devon Syndicate, 307 U. S. 299, 303 11

Rule of Court.

Rule 38, Sub-paragraph 5 8

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 748

CENTRAL STATES COOPERATIVES, INC.,
A Corporation,

Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY, INC.,
A Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

Opinions Below.

The opinions of the Circuit Court of Appeals, for the Seventh Circuit, is reported in 165 F. 2d 392, and appears in the Record at pages 195-203.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 12, 1947 and became final on January

20, 1948 when that Court denied the petition for rehearing (Rec. 218). The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petition seeks review by this Court of the judgment entered by the Circuit Court of Appeals for the Seventh Circuit, which court reversed and remanded the judgment of the District Court with directions that the District Court remand the cause to the state court from which it was removed (Rec. 203). The judgment of the District Court awarded the plaintiff the right to possession of the property described in this record in an action based upon the forcible entry and detainer statute of the State of Illinois (Rec. 143-145). The only issue on the trial of the cause was one of the right to possession (Rec. 47).

An additional statement of the case is necessary to present the facts in support of the argument made in this brief. Certain of the facts appear in the record, and certain facts occurring after the submission of the cause on the merits in the Circuit Court of Appeals, and after the decision of that Court, must be added by affidavit, and in an exhibit attached as an appendix to this brief.

On July 14, 1947, while the appeal was pending in the Circuit Court of Appeals, the petitioner sold and conveyed the premises which are the subject matter of this suit for possession to Yellow Terminals, Inc. (Rec. 186-189; 144-145). These premises were thereafter on December 4, 1947 voluntarily surrendered by the respondent to the grantee of the petitioner. That grantee has

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been in possession of the said premises since that date (see affidavit marked "Exhibit I." in the Appendix of this Brief). This occurred after the cause had been submitted on the merits in the Circuit Court of Appeals (Rec. 194).

Thereafter, on February 4, 1948, after the decision of the Circuit Court of Appeals, the petitioner filed a complaint against the respondent in the Superior Court of Cook County, Illinois, entitled *Central States Cooperatives, Inc., a District of Columbia Corporation, Plaintiff v. Watson Bros. Transportation Company, Inc., a Nebraska Corporation, and Burl Cotton, Defendants,* Cause No. 48 S 1841, a copy of which complaint is marked "Exhibit II." and is fully set forth in the Appendix in this Brief. This is a suit by the petitioner against the respondent to recover the reasonable rental value of the premises involved in this proceeding for the period from October 1, 1946 to July 14, 1947. The petitioner also seeks to recover double the reasonable rental value by reason of an alleged wilful holding over, pursuant to the terms of an Illinois statute described in the complaint. In addition, the complaint seeks the recovery of many items of special damage enumerated in the complaint, and alleged to have occurred by reason of the wilful retention of the premises by the respondent.

SUMMARY OF ARGUMENT.

I.

This Court having granted certiorari in a case involving the identical question of law involved in this petition, any argument on the question of law seems inappropriate.

National Mutual Life Insurance Company of the District of Columbia v. *Tidewater Transfer Company, Incorporated*, Docket No. 640, October Term, 1947.

II.

The controversy between the parties to this petition is no longer substantial, nor can this Court grant the petitioner effectual relief should it grant certiorari.

Heitmuller v. *Stokes*, 256 U. S. 359, 361.

Bell v. *Bruhn*, 30 Ill. App. 300, 301.

Daggitt v. *Mensch*, 41 Ill. App. 403, 405.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.

Helebrant v. *Sebesta*, 236 Ill. App. 461, 463.

Brown v. *Fletcher*, 237 U. S. 583.

Rorick v. *Devon Syndicate*, 307 U. S. 299, 303.

Furness, Withy & Co. v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 431.

Mills v. *Green*, 159 U. S. 651, 653.

Gulf Col. & S. F. Ry. Co. v. *Dennis*, 224 U. S. 503, 508.

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ARGUMENT.

I.

This Court having granted certiorari in a case involving the identical question of law involved in this petition, any argument on the question of law seems inappropriate.

Before the docketing of the petition in the instant case, this Court did on March 29, 1948 grant certiorari in a case involving the identical point of law; that is the case of *National Mutual Insurance Company of the District of Columbia* v. *Tidewater Transfer Company, Incorporated,* Docket No. 640, October Term, 1947. The Court, in its order granting certiorari, certified to the Attorney General of the United States that the constitutionality of the Act of April 20, 1940, 54 Stat. 143, 28 U.S.C.A. Sec. 41 (1) is drawn in question in that case. We think that it is inappropriate to argue this point since the Court has already granted certiorari. However, we do not concede the correctness of the argument of the petitioner nor the applicability of the citations set forth in his brief in support of his petition for certiorari.

By granting certiorari in the *Tidewater* case, it is made clear to us that the Court considers the question of constitutional law raised in this proceeding, one of importance requiring settling by a decision of this Court. Although the identical question of law is raised in this petition, we do not believe for the reasons assigned under Point II of this brief that certiorari should be granted in this case. The important issue of constitutional law can be fully settled in the *Tidewater* case without granting certiorari in a doubtful case where little benefit can accrue to the petitioner.

II.

The controversy between the parties to this petition is no longer substantial, nor can this Court grant the petitioner effectual relief should it grant certiorari.

There is no longer a controversy between the parties for possession of the premises, which is the subject matter of this suit. The petitioner having sold and conveyed the said premises involved in this case, and the grantee of the petitioner having accepted the surrender of the premises by the respondent, and having taken possession of the said premises on December 4, 1948, there is no longer a controversy between the parties for the possession of the premises (Rec. 186-189) (see affidavit marked "Exhibit I." in the Appendix of this Brief).

The review in this case, therefore, is not sought to restore petitioner to possession, but is solely an effort on the part of the petitioner to secure a reversal of the judgment of the Circuit Court of Appeals in an attempt to fix liability on the supersedeas bond filed by the respondent.

This Court has held that a conveyance of premises involved in an action for possession during the pendency of an appeal on the question of right of possession, rendered the question moot.

This was the decision in *Heitmuller* v. *Stokes*, 256 U. S. 359. In that case suit was originally brought in the Municipal Court of the District of Columbia for possession of certain described premises, and the Municipal Court rendered a judgment in favor of the defendant. The judgment in the Municipal Court was reversed by the Supreme Court of the District of Columbia, which judgment was affirmed in the Circuit Court of Appeals

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for the District of Columbia, and the cause was then taken by Writ of Error to the Supreme Court of the United States.

During the pendency of this Writ of Error, the defendant in error filed a motion to dismiss the Writ of Error setting forth as grounds for the motion that the cause of action between the parties had ceased to exist by reason of the fact that after judgment of the Court of Appeals, he had sold and conveyed the real estate which was the subject matter of the suit and was therefore not entitled to the relief sought in the action, namely, the possession of the premises, and in addition, that there was no actual controversy involving real and substantial rights between the parties, and no subject matter upon which the judgment of the Court could operate. This Court agreed that since the action was brought to recover possession of real estate, and that the defendant in error had sold the real estate pending the review in the Supreme Court, the case had become moot. The Court said at page 361:

> "As the action was brought to recover the possession of real estate, and as the defendant in error has, pending review in this court, sold it, we agree with the contention that the case has become moot. The plaintiff in error, so far as the record discloses, is in possession, and the defendant in error, having sold and conveyed the property, a judgment, if in his favor, will not give him possession of the premises. It has often been held that this court will not decide moot cases."

The factual aspects in our case are stronger in favor of the respondent. The premises not only have been conveyed, but the grantee is in possession (Rec. 186-189) (see affidavit marked "Exhibit I." in the Appendix in this Brief).

The Illinois cases, however, hold to the contrary on the question of the mootness of the cause by the conveyance of title during the pendency of an appeal. In *Bell* v. *Bruhn*, 30 Ill. App. 300, the Court says, page 301:

> "After the suit was commenced the appellee conveyed the premises, so that his right to the possession had terminated *pendente lite*. He was, however, at the commencement of the suit, entitled to the possession, and his recovery inures to the benefit of his grantee."

In *Daggitt* v. *Mensch*, 41 Ill. App. 403, affirmed 141 Ill. 395, 31 N. E. 153, the Court said at page 405:

> "We have held that a conveyance *pendente lite*, by the plaintiff in an action of forcible detainer, does not affect his right to recover, if at the commencement of the suit he was entitled to the possession. *Bell* v. *Bruhn*, 30 Ill. App. 300. And the same result attends any change of possession. *Patterson* v. *Graham*, 40 Ill. App. 399."

We present the Illinois cases in our responsibility to this Court and in fairness to the petitioner. While we believe that the Illinois law would apply under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, in a straight appeal to the Circuit Court of Appeals, we do not believe the same considerations apply in considering the question on a petition for certiorari. No more need be said on the considerations giving rise to the granting of the writ of certiorari than is as set forth in Rule 38 (5) of the Rules of this Court:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. * * *"

Although an important question of constitutional law arises in this case, that question can be fully settled in the case of *National Mutual Insurance Company of the*

District of Columbia v. *Tidewater Transfer Company, Incorporated*, Docket No. 640, where certiorari has already been granted.

We feel that the factual status of this record presents a case where certiorari should be denied. There are factors in our case in addition to the question of the mere conveyance of the property. The premises have been sold and the grantee of the petitioner placed in possession. The petitioner itself has filed an action against this respondent to recover for the reasonable rental value of the premises, for all items of damage alleged to have been sustained by the retention of the premises by the respondent, and for double the reasonable rental value of the premises. In a suit upon the supersedeas bond, double rent could not be recovered.

In the case of *Helebrant* v. *Sebesta*, 236 Ill. App. 461, 463 (1st Dist., 1925), the Court said:

> "It is, of course, elementary that the obligation of a surety on a bond is strictly construed in favor of the surety (*City of Sterling* v. *Wolf*, 163 Ill. 467) and applying this rule to the plain words of condition of the bond, it is difficult to conceive of any theory on which the defendant Pelikan could be liable for this statutory penalty.
>
> "The plaintiffs suggest that the surety might be liable under the clause which says, 'and also all damages and loss which plaintiffs have sustained or may sustain by reason of the withholding of the premises in controversy', but we are unable to see how such a construction of this clause can be sustained, for the obvious reason that 'damages' and 'loss' refer to actual loss and actual damages, while the provision of section 2 is for a penalty, it having been held that this statute is highly penal in its nature. *Loeb* v. *Alexander*, 174 Ill. App. 143.

"Moreover, we think that the precise question has been decided by the Supreme Court of this State in *Alexander* v. *Loeb*, 230 Ill. 454. That was a suit brought to recover this statutory penalty. There had been a previous suit brought on the appeal bond, and the defendant argued that the matter was *res judicata* by reason of that suit.

"The Supreme Court said: 'Under the conditions of the appeal bond, appellees could not have recovered in that case for double rent or for $20 per day liquidated damages.'"

It is clear, therefore, that the suit by the plaintiff in the Superior Court of Cook County, Illinois, is necessary if the plaintiff is to have a trial on the issues as to whether or not it is entitled to double rent pursuant to the Illinois Statutes. The determination therefore of the liability on the supersedeas bond still leaves the plaintiff where it must have an independent action if it is to secure double rent.

It is obvious therefore that the only purpose of the petition for certiorari is an effort on the part of the petitioner to secure a reversal of the judgment, a hearing on the merits in the Circuit Court of Appeals, and an affirmance of the judgment of the District Court so that a suit for damages may be predicated on the supersedeas bond.

Assuming *arguendo*, that this cause has not become moot, we have nevertheless a situation where this court cannot give the petitioner any effectual relief. It cannot put the petitioner in possession of the premises. It cannot determine the amount of liability on the supersedeas bond. At best this Court would only reverse the decision of the Circuit Court of Appeals on the ground that it erred in holding the statute involved unconstitutional and remand the cause to that Court with directions to pro-

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ceed to a determination on the merits. *Brown* v. *Fletcher*, 237 U. S. 583.

This review is confined to the questions that are urged in the petition for certiorari, and is limited by the petition to the question of the constitutionality of the Act of April 20, 1940, 54 Stat. 143, 28 U.S.C.A. Sec. 41 (1) extending the jurisdiction of District Courts. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303.

The Circuit Court of Appeals did not pass on the merits of the cause. It held that the District Court lacked jurisdiction to hear the cause in the first instance, and reversed and remanded the cause to the District Court with directions to remand the cause to the state court from which it came (Rec. 195-203).

The situation as it then exists would require the petitioner, if it were successful in this Court and in the Circuit Court of Appeals, on the hearing of the merits, to nevertheless go back to a new suit on the bond upon the issue of reasonable rental value and damages.

Because of this state of the record, we felt that it became our duty to this Court to disclose the additional facts in this brief in accordance with the decision in *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 431, so that the facts essential to an "adequate appreciation" of the situation is brought to the attention of the Court. In that case, the Court said at page 431:

> "The writ of certiorari was improvidently granted and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation to the situation had been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever in the progress of the cause facts develop which if dis-

> closed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ. *United States* v. *Rimer*, 220 U. S. 547; *State* v. *Water Commissioners*, 1 Vroom (30 N.J.L.) 247."

It is a situation, where this Court cannot grant it effectual relief. If the petition for certiorari is denied, the decision of the Circuit Court of Appeals remains in effect. That decision requires that the cause be remanded to the state court. There will be no judgment in favor of either of the parties to this proceeding and hence no prejudice to either of the parties. While the cause may not be strictly a moot cause, we do believe it is encompassed in the same category. This court has repeatedly held that it will not decide a controversy, the determination of which would serve no beneficial purpose to any of the parties. In the case of *Mills* v. *Green*, 159 U. S. 651, 653, the Court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

In *Gulf, Col. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 508, the Court said:

> "Almost from the beginning it has been the settled rule in this court that when, pending a writ of error to a lower Federal court, and without the fault of the defendant in error, an event occurs which renders it impossible, if the case was decided in favor of the plaintiff in error, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the writ."

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The denial of the petition will put the parties in an equal position. All of the issues as to damages, reasonable rental value, right to double rent, will be determined in the action presently pending in the Superior Court of Cook County, Illinois.

CONCLUSION.

While an important question of constitutional law is involved in this petition, it can be settled by the Court in the cause in which it has already granted certiorari. The facts developed in this matter, we believe, should induce a refusal on the part of this Court to grant certiorari in this case.

Respectfully submitted,

JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
Counsel for Respondent,
209 South LaSalle Street,
Chicago 4, Illinois.

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APPENDIX.

EXHIBIT I.

In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1947.

No. 748

Central States Cooperatives, Inc., a Corporation,
Petitioner,

v.

Watson Bros. Transportation Company Inc.,
a Corporation,
Respondent.

AFFIDAVIT.

Burl Cotton, being first duly sworn on his oath, deposes and says:

1. That he is the Chicago Manager of Watson Bros. Transportation Company, Inc., respondent herein;

2. That on December 4, 1947 the respondent surrendered possession of the premises described in this proceeding, the subject matter of this proceeding in forcible entry and detainer, to Mr. E. W. Wright, Terminal Manager of Yellow Terminals, Inc., and Yellow Terminals, Inc. took possession of the said premises on said date; and Yellow Terminals, Inc., is still in possession of the said premises.

.....

Burl Cotton

Subscribed and sworn to before me this 5th day of May, 1948.

.....

Notary Public.

EXHIBIT II.

State of Illinois,
County of Cook—ss.

In the Superior Court of Cook County

Central States Cooperatives, Inc., a District of Columbia corporation, Plaintiff, v. Watson Bros. Transportation Company, Inc., a Nebraska corporation, and Burl Cotton, Defendants.	Complaint at Law No. 48s 1841

COMPLAINT.

Now comes the plaintiff, Central States Cooperatives, Inc., a corporation organized under the laws of the United States in the District of Columbia, by Thomas G. McBride, its attorney, and for a cause of action alleges as follows:

(1) That the plaintiff is a corporation organized, incorporated and existing under and by virtue of the laws of the United States in the District of Columbia and is a citizen of the District of Columbia, duly licensed to do business in the State of Illinois.

(2) That the defendant, Watson Bros. Transportation Company, Inc., is a corporation organized, incorporated and existing under and by virtue of the laws of the State of Nebraska; that the defendant, Burl Cotton, is a resident and citizen of the State of Illinois.

(3) That Central States Cooperatives, Inc., plaintiff, was from the 25th day of June, 1946 until the 14th day

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of July, 1947 the owner of the legal title in fee simple in and to the real estate and premises situated in the City of Chicago, County of Cook and State of Illinois, described as follows, to-wit:

That part of the North Half (N½) of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian, more particularly described as follows: Beginning at a point which is intersection of center line of vacated Iron Street, as it exists South of vacated West 33rd Street, which is Fifty (50) feet wide, extended Northwesterly with North line of vacated West 33rd Street; thence Northeasterly at right angles to said center line extended Two Hundred Seventy-four (274) feet more or less to Westerly dock line of South fork of South branch of Chicago River, as occupied; thence North Forty-one (41) degrees, thirty (30) minutes, thirty (30) seconds West, One hundred sixty six (166) feet Eight and one-eighth (8-1/8) inches; thence North Thirty-two (32) degrees, Forty-seven (47) minutes West, Sixty-three (63) feet Four and one-half (4½) inches; thence North Twenty-nine (29) degrees, Forty-six (46) minutes, Twenty (20) seconds West, One Hundred Twenty (120) feet, Eleven and one-half (11½) inches more or less along said dock line as occupied to line formed by the extension East of South line of Lot Eight (8) of Shepard and Decreet's Subdivision of Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Alice Lynch's Subdivision of the Northwest quarter (NW¼) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Fourteen (14), East of the Third Principal Meridian; thence West along said South line extended Two Hundred Eighty-eight (288) feet Nine and five-eighths (9-5/8) inches more or less to intersection of said line with center line of vacated Iron Street, as exists South of West 33rd Street extended Northwesterly in a straight line; thence Southeasterly along said center line of va-

cated Iron Street (as exists South of vacated West 33rd Street extended Northwesterly Four Hundred Ninety-eight (498) feet and Nine (9) inches to place of beginning, containing One Hundred Six Thousand One Hundred Fifty-five (106,155) square feet, more or less;

having derived title to the said premises by warranty deed from Charles H. Morse, Jr. and Vesta C. Morse, his wife, dated and duly acknowledged on June 25, 1946 and recorded in the Recorder's Office of Cook County, Illinois on July 8, 1946 as Docmuent No. 13838043.

(4) That upon taking title to the said premises, the same was subject to an indenture otherwise known as a lease, dated July 31, 1945 by and between Charles H. Morse, Jr. as lessor and Watson Bros. Transportation Co., Inc., a Nebraska corporation, as lessee, defendant herein, whereby the said lessor demised and leased to the said lessee the above described premises, excepting therefrom a tract of land bounded by a line described as follows:

Beginning at the point of beginning of the tract of land hereinabove described; thence, Northeasterly on the Southerly line thereof Forty-nine (49) feet Ten and one half (10½) inches to the East line of vacated Iron Street North of vacated West 33rd Street; thence Northwesterly along the said Easterly line of vacated Iron Street Three Hundred (300) feet, Seven eighths (7/8) inches more or less to the intersection of said East line with the Westerly line of the tract of land hereinabove descirbed; thence Southeasterly along said Westerly line of said tract of land to the place of beginning; containing Seven Thousand Three Hundred Seventy-nine (7/379) square feet, more or less;

which said lease made the further reservation:

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Reserving unto Lessor and his assigns the right to use as a roadway the westerly thirty (30) feet of the demised premises running parallel to the West line of said premises and extending the entire length thereof;

for and during the term of one year commencing October 1, 1945 and ending September 30, 1946, to be occupied and used by said lessee for the purpose of receiving, loading, or unloading, transferring, shipping, dispatching, or similarly dealing with freight carried by motor trucks and motor vehicles, and as a garage and repair shop, and for all related purposes.

(5) That the lease provided, among other things as follows:

"That the lessor may at any time, upon at least ninety (90) days' written notice to the lessee of his intention so to do, cancel and terminate this lease in the event of a bona fide sale by lessor of the premises.

"In the event, during the term of this lease, or the extentions referred to in paragraph 18 hereof, lessor shall elect to sell the demised premises, then lessee shall have the right of first refusal, that is to say, the first opportunity to purchase the premises upon the same terms and conditions, and for the same conditions as lessor then proposes to sell the premises to any other individual, firm or corporation. In the event of any proposed sale, lessor shall advise lessee in writing of the name of the proposed purchaser, the terms and conditions of the proposed sale, and the consideration therefor, and lessee shall have ten (10) days from the receipt of such notice within which to notify lessor of its election to purchase the demised premises upon the like terms and conditions and for like consideration. In the event lessee shall not deliver to lessor, within said ten day period, a notice of its election to so purchase the premises, then lessor shall be free to sell the premises to the person named in and on the

same terms and conditions set forth in the notice first above mentioned, and this lease shall then be subject to termination by lessor in the manner first above mentioned."

(6) That Charles H. Morse, Jr., the said lessor, did elect on May 27, 1946 to sell the demised premises to the Central States Cooperatives, Inc., plaintiff herein, for the sum of One Hundred Thousand ($100,000.00) Dollars cash and on May 28, 1946 gave notice in writing to the defendant as lessee of such intention and of all of the terms and conditions of such proposed sale, and gave to the said lessee the right of first refusal and the first opportunity to purchase the premises upon the same terms and conditions; that the defendant as lessee did not within ten days of the receipt of such notice, or at any other time, notify said Charles H. Morse, Jr., as lessor of any election to purchase the premises upon like terms and conditions and for like consideration, or otherwise; that thereby the said Charles H. Morse, Jr., as lessor, was free to sell the said premises and to sell the premises to Central States Cooperatives, Inc., plaintiff herein, upon the terms and conditions set forth in the above mentioned notice.

(7) That on June 10, 1946 after the expiration of the ten-day period of the said lessor's right of first refusal, Charles H. Morse, Jr., the lessor, gave written notice to the defendant as lessee of his intention to terminate and to cancel and terminate the said lease effective September 30, 1946, more than ninety days from the date of said notice of termination, a copy of which notice is attached hereto, marked Exhibit "A", and made a part hereof.

(8) That the said lease also provided, among other things, as follows:

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"Lessee shall have the option of renewing this lease for a period of one year following the expiration of the term hereof, which option shall be exercisable by lessee by giving notice in writing to lessor by registered mail at least sixty days prior to the expiration of said term."

(9) That the said defendant, Watson Bros. Transportation Co., Inc., as lessee did not exercise such option of renewing the said lease by giving notice in writing to the lessor by registered mail, at least sixty days prior to the expiration of the said term, or in any other manner.

(10) That by reason of the above facts the lease of the defendant, Watson Bros. Transportation Company, Inc., in and to the above described premises expired on September 30, 1946.

(11) That the plaintiff herein did on the 29th day of July, 1946 demand of the defendant, Watson Bros. Transportation Company, Inc., that the said defendant surrender possession of the said premises to the plaintiff on October 1, 1946, a copy of which is attached hereto, marked Exhibit B and made a part hereof.

(12) That the defendant, Burl Cotton, during the period from June 25, 1946, when the plaintiff purchased the said property, to September 30, 1946, when the lease of the defendant, Watson Bros. Transportation Company, Inc., expired, was engaged in conducting the business of the defendant, Watson Bros. Transportation Company, Inc., as a servant, employe and agent of Watson Bros. Transportation Co., Inc., defendant.

(13) That upon the expiration of said lease on September 30, 1946, the defendants and each of them failed to vacate the said premises but wilfully, wrongfully, unlaw-

fully, and knowingly, and without any claim of right, forcibly retained and held possession of the premises above described and all parts thereof; that the defendants and each of them wilfully, wrongfully, unlawfully and knowingly, and without any claim of right, forcibly refused to admit the plaintiff to possession of the said premises, or any part thereof; that the defendants and each of them did continuously from October 1, 1946 to July 14, 1947 wilfully, wrongfully, unlawfully, and knowingly, and without any claim of right, withhold possession of the above mentioned premises and all parts thereof from the plaintiff herein.

(14) That the defendants and each of them, by reason of the wilful, wrongful, unlawful and knowing withholding of possession of the premises above described from the plaintiff herein, were and are trespassers upon the said premises from October 1, 1946 and during all the time thereafter the plaintiff owned said premises, until July 14, 1947.

(15) That the defendants are liable to the plaintiff for the use and occupancy of the above described premises from October 1, 1946 to July 14, 1947; that the reasonable rental value of the said premises so occupied by defendant during the period from October 1, 1946 to July 14, 1947 is the sum of Twenty Two Thousand Four Hundred Sixteen Dollars ($22,416.00) per year, or the sum of Eighteen Hundred Sixty-eight Dollars ($1868.00) per month; that the defendants, by reason of their wilful, wrongful, unlawful, and knowing holding over of possession of the said premises from the plaintiff herein from October 1, 1946 to July 14, 1947, are liable to the plaintiff at double the yearly value of the said lands, tenements, and hereditaments so detained for the period from October 1, 1946 to July 14, 1947 according to the statute

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of the State of Illinois in such case made and provided, Ill. Rev. Stat. 1947, Ch. 80, Par. 2, L. 1943, Vol. 1, p. 848, amounting to $35,367.28.

(16) That the defendants have failed and refused and continue to fail and refuse to pay the said sums or any part thereof to the plaintiff herein and has withheld the payment to the plaintiff of such moneys by an unreasonable and vexatious delay, by reason whereof the plaintiff is entitled to recover interest at the rate of 5% per annum upon such sums from the time they respectively became due.

(17) That as a direct and proximate result of the defendants' wilful, wrongful, unlawful and knowing withholding of the possession of the premises from the plaintiff herein, plaintiff suffered other and further damages, to-wit:

(a) The cost of moving stock, furniture, inventory, and other personal property from 1339 West 41st Street, Chicago and 1535 South Peoria Street, Chicago, on or about the 4th day of December, 1946, in the sum of Thirty-Seven Hundred Fifty-five and 86/100 Dollars ($3,755.86).

(b) The damage actually incurred as is usually customary and unavoidably incurred in moving perishable and semi-perishable goods, groceries, and other merchandise, to-wit: the sum of Eleven Hundred Twenty and 07/100 Dollars ($1120.07).

(c) That in order to operate the business of the plaintiff at 1336 Fullerton Avenue, Chicago, it was necessary to expend various sums of money for labor and materials in the installation of office partitions, refrigerating equipment, compressor, blowers, shelving, and electrical installation, which cannot be recovered, realized or salvaged, in the amount of Twenty-five Hundred Thirty-eight and 05/100 Dollars ($2538.05).

(d) Because of the unsuitability of available premises, plaintiff was required to operate its business from two locations from October 1, 1946 to December 1, 1946, requiring the plaintiff to expend moneys for the employment of two men in October and November, 1946 more than would have been required had the plaintiff been permitted to use the property referred to in paragraph 3 of this complaint, to-wit: the sum of Six Hundred Eighty-one and 60/100 Dollars ($681.60), and in addition thereto plaintiff was required to pay on account of said employment unemployment tax, Social Security tax, and workmen's compensation insurance.

(e) Because of the unsuitability of available premises at 1336 Fullerton Avenue, plaintiff was required to hire two additional men to handle the merchandise of the plaintiff in the operation of the plaintiff's business from December 4, 1936 to the present time at a weekly salary for each of Forty-two and 60/100 Dollars ($42.60), and in addition thereto plaintiff was required to pay on account of such employment, unemployment tax, Social Security tax, and workmen's compensation insurance.

(f) Because of the unsuitability of available premises, plaintiff was required to rent trucks to unload merchandise shipped to plaintiff by railway car at the rate of ten ars per month at a cost of Two Hundred Dollars ($200.00) per month from December 4, 1946 to the present time.

(g) Because of the inability of the plaintiff to get occupancy of 3201 Iron Street during the period of October and November, 1946 and not being able to get other premises in which to store heavy Fall shipments of merchandise, it was necessary to store large volumes of such merchandise in storage warehouses and to pay cartage

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expenses from the warehouse to the plaintiff's place of business, at a cost of Twenty-nine Hundred Fifty-three and 51/100 Dollars ($2953.51).

(h) On November 26, 1946 plaintiff was obliged to give up possession of its premises commonly known as 1339 West 51st Street and 1535 South Peoria Street, Chicago, Illinois, and to move to 1336 Fullerton Avenue, Chicago, Illinois; that for two weeks, from November 26, 1946 to December 10, 1946, their business was completely stopped, and for a period from December 10, 1946 to January 10, 1947 plaintiff's volume of business was impaired, with a loss of profits that would have accrued to them of Seventy-five Hundred Dollars ($7500.00).

To the damage of the plaintiff on One Hundred Thousand Dollars ($100,000.00), for which sum it prays judgment against the defendants and each of them.

Central States Cooperatives, Inc.,
By Thomas G. McBride, its attorney,
100 North La Salle Street
Randolph 4477.

State of Illinois,
County of Cook—ss.

Thomas G. McBride, being first duly sworn on oath deposes and says that he is the attorney for the plaintiff in the above entitled cause; that he has read the above and foregoing complaint by him prepared on behalf of the plaintiff, knows the contents thereof and that the same are true in substance and in fact.

_____

Subscribed and sworn to before me this ..... day of ..... A. D. 1948.

_____

Notary Public

EXHIBIT A.

Law Offices
Gallagher, Rinaker, Wilkinson & Hall
231 South La Salle Street
Chicago 4

June 10, 1946

Watson Bros. Transportation Co., Inc.
802 South 14th Street
Omaha, Nebraska

Attention Mr. Fay Watson, President.

Gentlemen:

As attorneys for Mr. Charles W. Morse, Jr. we wrote to you on May 25, 1946 giving notice of a written contract made and entered May 27, 1946 between Mr. Morse, as Seller, and Central States Cooperatives, Inc. as Buyer, for the sale of the motor truck terminal property in Chicago, Illinois, which your company now occupies as a tenant under lease dated July 31, 1945.

Paragraph 2 of the lease dated July 31, 1945, provides in part as follows:

> "The Lessor may at any time upon ninety days' written notice to Lessee of his intention so to do, cancel and terminate this lease in the event of a bona fide sale by Lessor of the premises."

Inasmuch as your company failed to exercise its option to purchase the premises, as provided in paragraph 2 of the lease, Mr. Morse has instructed us on his behalf to notify you and we do hereby notify you of his election, pursuant to the rights reserved in him under paragraph 2 of the lease, to cancel and terminate said lease effective September 30, 1946. Accordingly, said lease is hereby cancelled and terminated effective as of said date.

Very truly yours,
Gallagher, Rinaker, Wilkinson & Hall
By: (Sgd.) Samuel W. Witwer, Jr.

SWW:KG

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EXHIBIT B.

Law Offices
Brenner & McBride
100 N. La Salle St.
Chicago 2

July 29, 1946

Watson Bros. Transportation Co., Inc.
802 S. 14th Street,
Omaha, Nebraska.

Gentlemen:

On June 29th, following my letter of June 25th, I had a telephone conversation with Mr. Wolf, relative to the possible making of a lease from Central States Cooperatives, Inc. to your Company for the dock space on the property at 3201 South Iron Street, Chicago. At the conclusion of this conversation, Mr. Wolf stated that he would talk to Mr. Watson and would let me know in a few days what they wanted to do. Thirty days have elapsed from this time without any communication from you by letter or otherwise. Central States Cooperatives has naturally assumed that you are not interested in remaining in the premises after September 30, 1946.

This being the case we are in the course of making a lease with other prospective tenants for the occupancy of the dock space, beginning October 1, 1946. Since your present lease terminates September 30th we will expect you to vacate the premises on that date in order that Central States Cooperatives, Inc. may take possession of the same on October 1, 1946 and in order that the tenant of Central States Cooperatives may occupy the dock space on said property beginning October 1, 1946.

This letter is written for the purpose of avoiding any possible misunderstanding with regard to the above premises.

Yours very truly,
(Sgd.) Thomas G. McBride

TGM:D

JUNE 27, 1949.

Per Curiam Decisions.

No. 43. CENTRAL STATES COOPERATIVES, INC. *v.* WATSON BROS. TRANSPORTATION CO., INC. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further consideration in the light of *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582. *Thomas G. McBride* and *George E. Billett* for petitioner. *Julius L. Sherwin* and *Theodore R. Sherwin* for respondent. Reported below: 165 F. 2d 392.